PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CROWN CASTLE FIBER LLC, *Complainant*, v. COMMONWEALTH EDISON COMPANY, *Respondent*.	Proceeding Number 19-169 Bureau ID Number EB-19-MD-004

REPLY TO RESPONDENT'S ANSWER TO COMPLAINANT'S POLE ATTACHMENT COMPLAINT FOR DENIAL OF ACCESS

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SUMMARY

Crown Castle Fiber LLC's ("Crown Castle") Complaint presented two straight-forward claims. First, ComEd has denied Crown Castle access to "red tagged" poles unless Crown Castle first pays to replace, or in rare instance reinforce, the pole. The "red tagged" status of the pole is a pre-existing defect in the pole that is not caused by Crown Castle's attachment. Crown Castle demonstrated that as of April 30, 2019, Crown Castle had paid ComEd over $[redacted] for such red tag replacements and reinforcements. Second, Crown Castle also demonstrated that ComEd has failed to process hundreds of Crown Castle's pole attachment applications, covering thousands of poles, in the timeframes required by the Commission's rules. In many cases, the failure to timely act has exceeded the Commission's timeframes by months.

ComEd's Answer ultimately admits the fundamental facts supporting both of Crown Castle's claims. There is no dispute that ComEd insists that Crown Castle cannot have access to "red tagged" poles unless Crown Castle pays to correct the pre-existing defect in the pole. ComEd also admits that Crown Castle has paid over $[redacted] to do so. ComEd also admits that it has failed to process hundreds of Crown Castle's fiber and wireless applications, covering thousands of poles, in the timeframes required by the Commission's Rules. These fundamental facts establish that the Commission must rule for Crown Castle. ComEd's attempted explanations, excuses, and defenses are meritless and do not exonerate its violations of Section 224 and the Commission's Rules.

ComEd's argument that the Commission's rule against requiring new attachers to pay for pre-existing conditions applies only to "safety violations" is contradicted by the Commission's clear precedent. The prohibition on such charges is not limited to "safety violations." ComEd cannot charge Crown Castle to correct conditions or defects Crown Castle did not cause. Although irrelevant, because a "safety violation" is not required, ComEd's arguments regarding

the 2002 version versus the 2017 version of the NESC are a red herring. Likewise, ComEd's various other arguments regarding its red tag policy and practice are both inaccurate and irrelevant. The Commission's Rules require ComEd to correct the pre-existing problems with its poles. Whether the pole is "priority" red tag or "non-priority" red tag does not matter. The Commission has made clear that ComEd cannot claim Crown Castle's attachments precipitate the correction and try to charge Crown Castle.

Moreover, ComEd's claim that the red tagged poles lack sufficient capacity is also meritless. The Commission has interpreted "insufficient capacity" to mean a lack of physical space on the pole, an interpretation that was upheld by the Eleventh Circuit. Maintaining its poles is ComEd's responsibility. This case is a clear example of ComEd failing to perform necessary maintenance until an attachment is needed—a practice the Commission explicitly warned against. Insufficient capacity is a matter of the space on the pole, which cannot be dependent on the timing of ComEd's general pole plant maintenance.

Although ComEd asserts that the number of applications is slightly different than Crown Castle alleged, ComEd admits that it has failed to process hundreds of Crown Castle's fiber and wireless attachment applications in a timely manner. For example, whether ComEd has failed to timely act on 836 applications covering (9,159 poles) as Crown Castle asserts, or "only" 748 fiber applications (covering 8,075 poles), as ComEd asserts, failure to timely act on 748 fiber applications is still an egregious violation by ComEd.

Moreover, ComEd's factual assertions are also unsupported by evidence. ComEd's assertions regarding the number of applications, for example, is supported only by employee affidavits that merely parrot the conclusory allegations in the Answer. Such conclusory declarations are not supporting evidence to rebut Crown Castle's case. Despite having all of the

data available to it, ComEd does not introduce any materials or specifics to support its assertions. As a result, Crown Castle cannot respond to ComEd's assertions, and the Commission cannot accept them.

ComEd advances various excuses for its failure to timely act, attempting to blame Crown Castle in many instances. However, these arguments are meritless. For example, the Commission has rejected lack of staffing as an excuse for failure to meet the timelines. Likewise, although Crown Castle was not required to provide ComEd with estimated projections of its applications, Crown Castle's estimates were reasonably accurate given the many variables, and at a minimum, provided ComEd with advanced notice of the coming project. Fundamentally, ComEd has simply failed to act in a timely manner. As a result, the Commission should order ComEd to allow Crown Castle to control the process, including hiring and controlling approved contractors.

Finally, ComEd's affirmative defenses are unavailing. The Bureau has correctly rejected ComEd's claim that the Illinois Commerce Commission ("ICC") has jurisdiction. ComEd's argument that Crown Castle is not a telecommunications provider is contradicted by Crown Castle's certificate of authority from the ICC and the clear facts. There is no good faith basis for ComEd's challenge. ComEd's argument that Crown Castle's antenna attachments are "unregulated" is contradicted by the broad definition of a pole attachment, which includes "any" attachment by a telecommunications provider. There is no requirement that Crown Castle provide wireless service itself, and the Commission has rejected similar claims. Ultimately, the antennas are an integral part of Crown Castle's telecommunications service and protected by Section 224.

ComEd's arguments about corporate identity are also meritless. There has never been a transaction that triggered the transfer and consent provisions of the pole attachment agreements, and Crown Castle is the proper party under the agreements.

ComEd's attempt to avoid liability for its violations by arguing that relief should only be prospective are groundless. The ICC has never had jurisdiction over Crown Castle's attachments to ComEd's poles. There is no "retroactive" rulemaking. ComEd's argument is essentially that it thought it was free from any regulatory limits. That is obviously inaccurate. The Commission's rules on these issues are well-established and clear. ComEd's parent company even filed a petition for reconsideration of the Commission's One Touch Make-Ready Order, naming ComEd as one of its operating subsidiaries and specifically attacking the red tag issue, among others. ComEd cannot claim it had no warning that its actions were unjust and unreasonable and in violation of law.

Accordingly, ComEd has failed to rebut Crown Castle's claims, and the Commission should grant Crown Castle the relief requested.

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I. INTRODUCTION

Crown Castle Fiber LLC ("Crown Castle"), by and through undersigned counsel, and pursuant to 47 C.F.R. § 1.728, replies to Respondent Commonwealth Edison Company's ("ComEd") Answer to Crown Castle's Pole Attachment Complaint for Denial of Access in the above-referenced docket. Rather than engage in a repetitive paragraph-by-paragraph reply to ComEd's paragraph-by-paragraph Answer, Crown Castle addresses issues raised in its Complaint and ComEd's Answer by topic, with references to the appropriate Complaint/Answer paragraphs at issue.

REPLY TO ANSWER

II. COMED'S FAILURE TO JUSTIFY ANY OF ITS ALLEGATIONS WITH SUPPORTING EVIDENCE IS GROUNDS TO REJECT COMED'S DEFENSES AND ASSERTIONS

A fundamental defect that is fatal to ComEd's entire Answer is its failure to introduce any supporting evidence. Commission Rule 1.721(d) requires all averred "facts, claims, or defenses" to be "supported by relevant evidence."[1] As discussed below, throughout its Answer, ComEd fails to introduce any relevant and admissible evidence in support of its factual allegations. Instead, throughout the Answer, ComEd cites to declarations from its employees as alleged support for conclusory statements of fact. But review of those declarations reveals that they merely parrot, generally word-for-word, the conclusory statement in the Answer.[2] The Declarations do not introduce or attach any supporting evidentiary materials. For example, in support of its claims regarding ComEd's failure to process permits in a timeline fashion, Crown

[1] 47 C.F.R. § 1.721(d).

[2] *Compare, e.g.*, Answer ¶¶ 45-46 *with* Answer Ex. I, Herrera Decl. ¶¶ 4, 10 (CEC102-103); Answer ¶¶ 64-65 *with* Answer Ex. I, Herrera Decl. ¶¶ 5-6 (CEC102-103). Hereinafter, references to "Answer ¶" are references to ComEd's paragraph-by-paragraph responses to the paragraphs in the Complaint.

Castle's witnesses attached detailed tables and spreadsheets listing applications by number, pole number, submission date, and other relevant factors that confirm the allegation.[3] Despite having a database with all of its pole information available, ComEd introduces no such supporting material. Even when ComEd disputes the number of applications that have exceeded the Commission's timelines, for example, its witnesses do not provide *any* support for their conclusory assertions—no identification of application numbers allegedly not delayed, no pole numbers, nothing.[4]

It is well established that witness declarations that merely provide conclusory statements that mirror the pleading do not constitute supporting evidence. "A self-serving affidavit that simply reiterates the conclusory allegations of the complaint without other support is insufficient to raise a genuine issue of material fact."[5] Indeed, this is particularly true when the other party (Crown Castle in this case) has submitted supporting evidence: "a self-serving, contradictory affidavit fails to raise a triable issue of fact when it conflicts with documentary evidence. Indeed, even when not refuted by clear documentary evidence, . . . self-serving, factually unsupported affidavits that merely parrot a complaint's allegations generally fail to raise triable issues of fact."[6]

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[3] *See, e.g.*, Complaint ¶ 43, Whitfield Decl. Exh. 3.

[4] *See, e.g.*, Answer Ex. I Herrera Decl. ¶¶ 13, 18-21 (CEC000104-105).

[5] *See, e.g.*, *Wininger v. Searles*, No. CIVA 3:02CV747 WWE, 2006 WL 2839136, at *6 (D. Conn. Aug. 4, 2006); *Armstrong v. Potter*, No. 3:08CV1615 (HBF), 2010 WL 2584885, at *1 (D. Conn. June 21, 2010); *see also Brinson v. Conagra Foods, Inc.*, No. 8:08CV133, 2009 WL 606482, at *1 (D. Neb. Mar. 6, 2009) (refusing to consider an affidavit that repeated and reiterated the Complaint and other pleadings); *Borges v. City of Hollister*, No. C03-05670 HRL, 2005 WL 589797, at *9 (N.D. Cal. Mar. 14, 2005) (holding that declarations that merely repeated allegations in a complaint were insufficient to raise triable fact issue).

[6] *Christiana Bank & Tr. Co. v. Dalton*, No. 06-CV-3206 JS/ETB, 2009 WL 4016507, at *4 (E.D.N.Y. Nov. 17, 2009).

ComEd's failure to properly support its allegations is a fatal flaw in addition to the fatal legal flaws in ComEd's position.

III. COMED'S PRACTICES REGARDING "RED TAG" POLES ARE UNLAWFUL

As Crown Castle showed in the Complaint, the Commission has explicitly held that pole owners cannot require a new attaching party to pay the cost of replacing a "red tagged" pole as a condition of access to the pole.[7] This is a straightforward and long-established principle. As demonstrated below, ComEd's arguments against Crown Castle claim are irrelevant legally, factually incorrect and unsupported, or both. Contrary to ComEd's argument, the Commission's rule does not apply only if the preexisting condition constitutes a "safety violation."[8] As a result, ComEd's extensive emphasis on the version of the NESC adopted in Illinois is irrelevant. The "red tag" label by ComEd means the pole is out of compliance with an applicable standard, and is, therefore, not Crown Castle's obligation to fix. Ultimately, as further explained below, ComEd's arguments about the requirements of the NESC are also incorrect.

In addition, ComEd attempts to characterize "red tagging" poles as a "capacity" issue when it clearly is not.[9] As discussed *infra*, the Commission has held, and the Courts have affirmed that a lack of "capacity" concerns physical space on the pole, not the on-going obligation of the pole owner to maintain the pole's strength. ComEd's requirement to replace red tagged poles is unrelated to insufficient physical space on the pole. Nonetheless, the issue is ComEd's duty to maintain its poles, not the capacity of the pole.

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[7] Complaint ¶¶ 121-38.

[8] Answer ¶ 61.

[9] *Id.*

Although they are legally irrelevant, ComEd's arguments about its red tag policy are also wholly unsupported by any facts or evidence. There is no evidence that ComEd immediately corrects poles that have lost so much strength they present an imminent threat to persons or property. Indeed, there is no evidence demonstrating that ComEd corrects "priority" red tagged poles within a year. ComEd admits that it has a database of every red tagged pole, but it has submitted no evidence about any of its red tagged poles or ComEd's actions to correct them.[10] Ultimately, none of ComEd's arguments, even if supported, contradict the simple fact that ComEd is prohibited from requiring Crown Castle to pay to replace red tagged poles—in this case in an amount now nearing $[redacted][11]—as a condition of accessing those poles.

A. Established Commission Precedent Makes Clear That Pole Owners Cannot Deny Access Unless The New Attacher Agrees To Pay To Correct Pre-Existing Conditions

In its Complaint, Crown Castle demonstrated that ComEd's requirement that Crown Castle replace "red tagged" poles as a condition of access clearly violates the Commission's long-established precedent that pole owners cannot require new attachers to pay to correct pre-existing conditions.[12] ComEd's Answer fundamentally fails to rebut Crown Castle's showing. None of ComEd's arguments alter the fundamental fact that the law prohibits ComEd from forcing Crown Castle to pay to correct the pre-existing condition that ComEd claims must be corrected before Crown Castle can access the pole. ComEd's attempted justifications for its red

[10] *Id.* ¶¶ 50, 107.

[11] As discussed in Ms. Whitfield's Reply Declaration, because the parties' activities are on-going, Crown Castle has paid ComEd nearly $[redacted] more to replace red tagged poles on top of the April 30, 2019 data used in the Complaint. Reply Declaration of Maureen Whitfield ("Whitfield Reply Decl.") ¶ 4 (attached hereto as Attachment A). As the case continues, the amount Crown Castle has paid ComEd will continue to grow.

[12] Complaint ¶¶ 121-38.

tagging policies and actions are irrelevant (and factually inaccurate). Under no circumstances has ComEd demonstrated that requiring Crown Castle to replace red tagged poles fixes a problem that Crown Castle has caused. And that is the only legally relevant issue.

Ultimately, the Commission rejected the very arguments and scheme advanced by ComEd. The *OTMR Order* explicitly clarified that well-established Commission precedent prohibits pole owners from requiring new attachers to pay to correct red tagged poles.[13] In a point that is particularly relevant to this case, the Commission explained that "[t]he new attachment may precipitate correction of the preexisting violation, *but it is the violation itself that causes the costs, not the new attacher*. Holding the new attacher liable for preexisting violations ***unfairly penalizes the new attacher for problems it did not cause***. . . ."[14] Here, ComEd's position is just that: ComEd claims that the new attachment is precipitating the correction, but the Commission has rejected that assertion as grounds to make the new attacher to pay.[15]

Moreover, to the extent that ComEd argues that Crown Castle could simply wait for ComEd's pole replacement routine to run its course, that also is not a legitimate argument. The Commission explicitly prohibited such schemes, "reject[ing] proposals from utilities that new attachers should be forced to either 'wait for the corrective process to run its course' or 'cover[] the cost of correcting the violation, without recourse."[16]

[13] *OTMR Order* ¶ 121, n.450.

[14] *Id.* ¶ 121 (emphasis added).

[15] *Id.*

[16] *Id.* n.453.

B. The Commission's Rule Against Charging New Attachers To Correct Existing Conditions Is Not Limited To Pre-Existing "Safety Violations"

ComEd's defense also relies heavily on an argument that the Commission's ruling against charging new attachers to correct red tagged poles applies only if the red tag reflects a "safety violation."[17] That argument is also incorrect.

It is a well-established rule that a pole owner cannot require a new attacher to pay the cost of work on the pole that is not caused by the new attacher. That principle is not limited to matters that constitute what ComEd would deem a "safety violation." In the *OTMR Order*, the Commission clarified that "new attachers are not responsible for costs associated with bringing poles or third-party equipment into compliance with current safety ***and pole owner construction standards*** to the extent such poles or third-party equipment were out of compliance prior to the new attachment."[18] The Commission made clear that this point is consistent with its "long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment."[19]

In the *Local Competition Order*, the Commission established that if a utility uses a proposed modification as an opportunity to bring its facilities into compliance "with applicable safety ***or other requirements,***" the utility is responsible for the cost for correcting the pre-existing condition.[20] The Commission did not limit this principle to existing "safety violations" but included any "other requirements." Moreover, of particular relevance to ComEd's scheme in

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[17] *See, e.g.*, Answer ¶¶ 61, 103, 113, 121, 127, 138.

[18] *OTMR Order* ¶ 121 (emphasis added).

[19] *Id.* (citing *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, 24625 ¶ 26 (2003); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd. 11599, 11606-07 ¶ 19 (CSB 1999)).

[20] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1212 (1997) ("*Local Competition Order*") (emphasis added).

this case, the Commission emphasized that the rule was intended to "***discourage parties from postponing necessary repairs in an effort to avoid the associated costs***."[21]

As a threshold matter, the Commission's various Orders make clear that this rule does not apply only when the pre-existing condition qualifies as a "safety violation," contrary to ComEd's assertion.[22] In the *OTMR Order*, the Commission mentioned not only safety violations, but also poles that are not currently in compliance with "pole owner construction standards."[23] And in the *Local Competition Order*, the Commission spoke in terms of applicable safety "or other requirements."[24] Fundamentally, the Commission's Orders make clear that a new attacher is not responsible for work that benefits the pole owner.

The Commission's Orders on this point are consistent with Section 224(f). The only legitimate grounds for ComEd to deny access to a pole is "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[25] In this case, if the application of red tag status does not indicate a "safety violation," then it is not grounds for ComEd to deny access to the pole. Although unclear from its Answer, ComEd may be arguing that the red tagged pole reflects an existing conflict with ComEd construction

[21] *Id.* (emphasis added). The Commission made clear that "A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost." *Id.* ¶ 1212. At a minimum, in this situation, ComEd is using Crown Castle's proposed attachment (the modification to the pole) as an opportunity to bring ComEd's facilities into compliance and therefore ComEd should be responsible for its share of the modification cost, which in this case is the cost of the new pole and its installation.

[22] Answer ¶ 61.

[23] *OTMR Order* ¶ 121.

[24] *Local Competition Order* ¶ 1212.

[25] 47 U.S.C. § 224(f)(2).

standards or NESC standards that reflect reliability and generally applicable engineering issues.[26] But again, those are pre-existing conflicts with ComEd's construction standards that are not caused by Crown Castle's proposed attachment and are not Crown Castle's responsibility.[27] ComEd is supposed to fix them regardless of whether Crown Castle ever attached to the pole.

The condition that ComEd identifies as causing the red tag status—general deterioration of the pole over time—is fundamentally ComEd's responsibility to correct. For example, if Crown Castle were already attached to these poles and due to the passage of time the poles deteriorated to the point where they needed to be replaced because of lost strength, ComEd would not impose that replacement cost on the existing attachers as a charge separate from the annual rental. ComEd's cost of upkeep of its pole plant is recovered through the annual rental formula.[28] Just as the Commission warned against in the *Local Competition Order*, ComEd is attempting to postpone necessary repairs to avoid the cost and instead impose that cost on third party attachers.

C. ComEd's Argument That Crown Castle's Case Is Fatally Flawed Because It Cites The 2017 Version of the NESC Rather Than The 2002 Version Of The NESC Is Irrelevant And Incorrect

In furtherance of its position that only a "safety violation" is covered by the Commission's rules, ComEd also seeks to make much of the fact that Illinois is the only State other than Hawaii that has not adopted an updated version of the NESC, and still follows only

[26] *See* Answer at 59, ¶ 61 (stating it denies access because the poles are "at full capacity based on ComEd's engineering and reliability standards. . . .")

[27] Crown Castle addresses *infra* ComEd's assertion that the poles lack sufficient capacity.

[28] *See* 47 C.F.R. § 1.1406(b) ("The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs.").

the 2002 version of the NESC.[29] ComEd's argument in this respect is both legally irrelevant and incorrect. As discussed above, ComEd's focus on the version of the NESC cited by Crown Castle is ultimately irrelevant because the Commission's rule is not limited to "safety violations." Therefore, whether the red tag status constitutes a "safety violation" of the NESC, either the 2002 or 2017 version, is irrelevant. Nonetheless, as discussed below, ComEd's arguments are also incorrect.

1. The 2002 and 2017 NESC Are Not Substantively Different

ComEd's attack on Mr. Bingel's citation of the 2017 version of the NESC is meritless. First, as Mr. Bingel—who is the Chairman of the NESC—explains in his Reply Declaration, the intentions and fundamental requirements of Rule 214.A.4 and Rule 214.A.5 are the same in both versions.[30] ComEd's argument appears, fundamentally, to suggest that the 2002 version of the NESC does not require ComEd to correct the "red tagged" poles. But that is wrong. Under either the 2002 or 2017 version of the NESC, ComEd is obligated to correct the poles.[31]

First, as Mr. Bingel discusses in his Reply Declaration, ComEd did not include the 2017 edition of Rule 214.A.4 in its comparison. The following is a full comparison of both editions of Rule 214.A.4:

2002 Edition

214. Inspection and Tests of Lines and Equipment

A. When in Service

……..

4. Record of Defects

[29] Answer ¶¶ 29-31, 34-36, 42, 53, 61, 103, 105, 106, 108, 109, 114, 116-19, 121-24, 127, 138; Reply Declaration of Nelson Bingel ("Bingel Reply Decl.") ¶ 8 (attached hereto as Attachment B).

[30] Bingel Reply Decl. ¶¶ 7-21.

[31] Bingel Reply Decl. ¶¶ 9, 15, 21.

> Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defects are corrected.

2017 Edition

214. Inspection and tests of lines and equipment

A. When in service

……

4. Inspection records

Any **conditions or** defects affecting compliance with this Code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the **conditions or** defects are corrected.

The language in Rule 214.A.4 is identical in both editions except for the addition of "conditions or" which does not change the intent of the rule.[32] The intent is that all defects are to be recorded and those records maintained until the defects are corrected.[33] The expectation is that all defects need to be corrected, and that those that are not "promptly corrected" will be recorded.[34]

Specifically, wood poles identified with remaining strength below code requirements need to be corrected.[35] This requirement is emphasized in Table 261-1A of the 2002 NESC which addresses strength factor requirements for structures. Footnote 2 states:

> "Wood poles and reinforced concrete structures shall be replaced or rehabilitated when deterioration reduces the structure strength to 2/3 of that required when installed."

The words "shall be" and "when" call for planned restoration or replacement with a sense of urgency that is greater than Rule 214.A.4.[36] The language requires that the pole shall be replaced or rehabilitated "when" the deterioration reduces the strength to 2/3 of the strength required

[32] Bingel Reply Decl. ¶ 9.

[33] *Id.*

[34] *Id.*

[35] *Id.* ¶ 10.

[36] *Id.* ¶ 11.

when installed.[37] The language does not call for replacement or rehabilitation "eventually," such as when a new attachment is proposed.

In addition, as Mr. Bingel explains, both editions of the NESC call for the same priority of remediation for poles that have a remaining strength below code requirements.[38] Again, a comparison of the 2002 and 2017 NESC is useful (amended terms in 2017 are bolded):

2002 Edition

214. Inspection and Tests of Lines and Equipment

A. When in Service

……..

5. Remedying Defects

Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated.

2017 Edition

214. Inspection and tests of lines and equipment

A. When in service

……

5. **Corrections**

a. Lines and equipment with recorded **conditions or** defects that **w**ould reasonably be expected to endanger **human** life or property shall be promptly **corrected**, disconnected, or isolated.

b. **Other conditions or defects shall be designated for correction**.

The 2002 Rule 214.A.5 is slightly modified in 2017 by adding "conditions or", putting "human" in front of life, and by using the word "corrected" instead of "repaired." However, as Mr. Bingel explains, the intent is the same, as the changes in language were only to provide more clarity.[39] The 2017 Rule 214.A.5.b is an additional statement compared to the 2002 NESC. However, the intent of the rules is the same in both editions.[40] Rule 214.A.4 in both editions require the

[37] NESC Rule 214.A.4; Bingel Reply Decl. ¶ 10.

[38] Bingel Reply Decl. ¶ 17.

[39] Bingel Reply Decl. ¶ 18.

[40] *Id.* ¶ 19.

records of defects to be maintained until defects are corrected. In both cases, defects are required to be recorded and are expected to be corrected.

It is true that the 2017 edition has an additional statement referring to conditions or defects that would ***not*** reasonably be expected to endanger human life or property. However, it simply states that those defects shall be designated for correction. As Mr. Bingel makes clear, that is not an additional requirement imposed by the 2017 edition that was not present in the 2002 edition.[41] In both editions of Rule 214.A.4, all defects are expected to be corrected. Rule 214A.5.b simply restates the requirement that "Other conditions or defects shall be designated for correction."

2. ComEd Is Required To Timely Replace Or Reinforce Red Tagged Poles Under Both The 2002 and 2017 NESC

To the extent that ComEd argues that under the 2002 NESC version ComEd was under no obligation to promptly correct the condition, that argument is patently untenable and incorrect. Yet, that appears to be ComEd's position, and indeed, its practice. In its response to Crown Castle's paragraph 35, ComEd states:

> For both "priority" and "non-priority" poles, there is no "industry standard" that details a timeframe for the replacement of reject structures beyond the "promptly" called for in Rule 214.A.5 for those defects "expected to endanger life or property."[42]

Thus, ComEd explicitly states that its position is that only when the pole reaches a point "expected to endanger life or property" does ComEd believe it is required to replace the pole. Moreover, it is overwhelmingly clear that for poles that have between 33 and 67 percent of their original strength remaining—so-called "non-priority" red tagged poles—ComEd has no set

[41] *Id.* ¶ 19.

[42] Answer at 40, ¶ 35.

schedule for correcting them.[43] ComEd's "schedule" is to let the poles remain, uncorrected, until some party (including perhaps ComEd) needs to do some work on the pole.[44] In other words, ComEd appears to believe that under the 2002 version of the NESC it is not obligated to correct those "non-priority" poles. And for "priority" reject poles, ComEd conclusorily asserts that "ComEd's 'Priority' red-tagged poles are not such poles that must 'promptly' be 'repaired, disconnected, or isolated.'"[45] As Mr. Bingel discusses, this assertion is particularly troubling given that ComEd also asserts that "priority" reject poles have less than 33% of their originally required strength remaining.[46]

Again, all of these details are ultimately irrelevant. Why ComEd has so many red tagged poles, and why it has not replaced or reinforced them in a timely manner does not matter. The Commission has repeatedly made clear that ComEd cannot use Crown Castle's request to attach to a pole as an opportunity to correct the pre-existing condition that creates the "red tag" status at Crown Castle's expense.

D. ComEd's Red Tagged Poles Are Not Lacking "Capacity"

ComEd ultimately asserts in multiple paragraphs that the poles at issue "are at full capacity" and, therefore, "because capacity is being expanded to accommodate Crown Castle's proposed attachments, the pole replacement or reinforcement is for the benefit of Crown Castle . . . ."[47] ComEd's argument is meritless. "Insufficient capacity" is an issue of physical space on the pole in light of existing attachments. In contrast, red tag status reflects fundamental

[43] *Id.*¶¶ 29-30, 35, 39-41.

[44] *Id.* ¶ 41.

[45] *Id.*at 40 ¶ 35.

[46] Bingel Reply Decl. ¶¶ 28-29.

[47] *See, e.g.*, Answer at 58-60, 62, 64, 66 (¶¶ 57, 61, 71, 125, 126, 137).

deterioration of the wood over time. The red tag status is unrelated to the attaching parties, is constantly changing over time, and ultimately is entirely within the control of the pole owner.

ComEd relies on the Eleventh Circuit's decision in *Southern Company v. FCC* for the proposition that ComEd is not required to expand capacity.[48] However, as the Commission and courts have recognized, "insufficient capacity" is an issue of the vertical space on the pole, not the state of decay. The Eleventh Circuit in *Southern Company* upheld the Commission's definition of "insufficient capacity" to mean "the actual absence of ***usable physical space on a pole***."[49] In his Reply Declaration, Mr. Bingel further supports the proposition that insufficient capacity is an issue of vertical space and loading, not an issue of whether the pole owner has allowed the pole to deteriorate over time.[50]

Moreover, the Eleventh Circuit repeatedly emphasized that it was rejecting the capacity expansion requirement only "*where it is agreed* [that] capacity . . . is insufficient to accommodate a proposed attachment."[51] The Eleventh Circuit also affirmed the Commission's determination that utilities do not have "unfettered discretion to determine when capacity is insufficient."[52] When the court construed Section 224(f)(2) in the situation where the parties do *not* agree that capacity was insufficient, it "held . . . insufficient capacity' . . . is ambiguous," and

[48] *See, e.g., id.* at 59 (citing *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002)).

[49] *Southern Co.*, 293 F.3d at 1349 (emphasis added); *see also Florida Cable Telecommunications Ass'n, Inc., v. Gulf Power Co.*, 26 FCC Rcd. 6452, 6454 ¶ 5 (2011) (noting that in *Southern Company* the Eleventh Circuit "the court affirmed the Commission's interpretation of the term 'insufficient capacity' to mean 'the actual absence of usable physical space on a pole").

[50] Bingel Reply Decl. ¶¶ 39-44.

[51] *See Southern Co.*, 293 F.3d at 1346, 1347, and 1352.

[52] *Southern Co.*, 293 F.3d at 1348; *see also Florida Cable Ass'n*, 26 FCC Rcd at 6454 ¶ 5.

thus affirmed the Commission's interpretation, which focused on usable physical space.[53] In this case, Crown Castle does not agree that the "red tagged" poles have insufficient capacity.

Indeed, the fact that deterioration over time is not a "capacity" issue makes logical sense. Deterioration is constantly occurring and unrelated to how many parties are attached to the pole. Under ComEd's theory, a given pole may have three existing attachers when new—electric, telephone, and cable—with sufficient space to accommodate additional attachment. But solely as a result of the passage of time and the inevitable deterioration of the wood, at some point that pole would have insufficient strength to accommodate even the existing attachments. Clearly, the need for the pole owner to replace poles as the result of deterioration over time is not a "capacity" issue. It is an obligation of the pole owner that is unrelated to any existing or new attachments. Indeed, forcing attaching parties to pay for pole replacement solely due to the pole's deterioration over time significantly conflicts with the Commission's rental rate formula. The new, replaced pole becomes part of the utility's pole plant and contributes to the rental attaching parties must pay. The attaching party that paid for the new pole should not be required to pay rent to recover the cost of the pole that *it paid for in full*.

Ultimately, ComEd's failure to follow its own alleged repair timeframes emphasizes why "capacity" cannot be left to the pole owner's timing for replacing a deteriorated pole. For example, On July 5, 2018, Crown Castle applied to attached fiber to a pole at approximately 5659 W. Madison St.[54] The pole was red tagged, and on February 28, 2019, Crown Castle received the make ready estimate for the pole, which Crown Castle paid on March 4, 2019.[55]

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[53] 25 FCC Rcd. at 11871 (quoting *Southern Co.*, 293 F.3d at 1348).

[54] Whitfield Reply Decl. ¶ 6.

[55] Whitfield Reply Decl. ¶ 6.

However, the tags on the pole reveal that the pole was inspected and labeled as a red tag "priority non-restorable (replacement)" in 2017.[56] That fact is apparent from the tag nailed on the red tag saying "Osmose 2017."[57] According to ComEd, priority non-restorable red tag poles are scheduled for replaced "the next calendar year," which in this case should have been 2018.[58] If that were true, however, when Crown Castle applied for attachment in July 2018—the year after it was red tagged for replacement in 2017—the pole should have already been replaced, or at a minimum shown as scheduled to be replaced before the end of 2018. If ComEd had performed the necessary maintenance on its own pole in even the time it claims it does, the pole would have been brand new when Crown Castle applied. Instead, ComEd forced Crown Castle to pay for the replacement and now claims it was because the pole had insufficient capacity. Whether the pole lacks sufficient capacity cannot be an issue of the timing of replacement by the pole owner, particularly when it is clear that ComEd is not actually replacing poles even under its own questionable timeframes.

E. Miscellaneous Additional Errors, Issues, And Conflicts In ComEd's Answer

Although irrelevant to the ultimate legal issue in this case (as demonstrated above), there are many errors and inaccuracies in ComEd's Answer that should not go unaddressed. Accordingly, without waiving the fact that they are legally irrelevant, Crown Castle addresses various errors and inaccuracies in ComEd's Answer in the following subsections of this Subsection E.

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[56] Whitfield Reply Decl. Exh 3.

[57] A photo of the tags is at Whitfield Reply Decl. Exh. 3 and ComEd's Guide for interpreting the tags is at Whitfield Decl. Exh. 1 (CCF00146).

[58] Answer ¶ 37.

1. ComEd Acknowledges The Existence Of A Red Tag Pole Database And Pole Design Standards, But Refuses To Share The Information With Crown Castle Or The Commission

As Crown Castle explained in its Complaint, compounding the issues that Crown Castle has encountered is ComEd's refusal to share information regarding red tagged poles.[59] ComEd admits that has a database with information regarding every red tagged pole.[60] ComEd admits that it is "possible to query the database to identify which of those poles are red tagged."[61] Yet, ComEd also explicitly admits that it refuses to allow Crown Castle (or apparently even the Commission) to access the database or the information in it.[62] ComEd claims that the information in the database—about poles that are out in public—is confidential and "sensitive," and ComEd does not share information with attaching parties.[63]

ComEd's refusal to provide Crown Castle with access to information about its poles that is readily available to ComEd is unreasonable. The Commission has made clear that a pole owner must make its "maps, plats, ***and other relevant data*** available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information."[64] Thus, ComEd's refusal to share relevant information with Crown Castle is unreasonable and flies in the face of the Commission's precedent.

In addition, ComEd's admission about the pole database emphasizes the inadequacy of ComEd's assertions. In every case in its Answer, ComEd provides absolutely no evidence to

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[59] Complaint ¶¶ 50, 107.

[60] Answer ¶¶ 50, 107.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Local Competition Order* ¶ 1223 (emphasis added).

support its conclusory assertions. For example, ComEd asserts that it corrects priority red tagged poles within the same year or the following year. Yet, ComEd does not provide any proof of this assertion—even though it has a database from which it could easily identify when a pole was classified as priority and when it was replaced. Similarly, ComEd makes assertions regarding the number of red tagged poles identified by Crown Castle and what Crown Castle has paid, but ComEd does not provide any information to support the allegations.[65] Crown Castle provided extensive tables with pole numbers, invoice numbers, and other information.[66] Despite having a database of information, ComEd submitted no specific information, relying entirely on conclusory statements in employee declarations that repeat the same conclusory statements found in the Answer.[67]

2. ComEd's Description Of Its Red Tag Categories And Alleged Replacement Timeframes Are Inconsistent And Further Demonstrate ComEd Will Only Replace A Pole Itself When It Is An Imminent Safety Threat

As Crown Castle detailed in the Complaint, ComEd had refused to be forthcoming regarding the standards that it uses when classifying a pole as "red tagged" or "reject."[68] Although ComEd's Answer provides some additional detail and confirmation of its thresholds,

[65] *See, e.g.*, Answer ¶¶ 45, 46, 63-65, 67, 68-70, 72-74.

[66] *See, e.g.*, Complaint ¶¶ 43, 45-46, 49, 62-99.

[67] *Compare, e.g.*, Answer ¶¶ 83-86 *with* Answer Ex. I Herrera Decl. ¶¶ 18-21.

[68] Complaint ¶¶ 33, 37-41, 47-51.

its descriptions reveal inconsistencies, at a minimum, and strongly support the conclusion that ComEd's strategy is to not replace a red tagged pole until it is an imminent threat to life.

First, ComEd asserts that it immediately corrects poles that are "expected to endanger life or property."[69] However, ComEd also asserts that its "priority" poles are "not such poles that must 'promptly' be 'repaired, disconnected, or isolated.'"[70] This appears to mean that there is a category of poles that is not "priority" but are in fact an imminent threat to life so as to finally require replacement by ComEd.

Second, in a confusing moment, two of ComEd's witnesses assert that "non-priority" red tag poles are treated with a preservative and thereafter maintain their "present reliable state of service."[71] This assertion of "reliable state of service" raises myriad issues. As Mr. Bingel explains, the Osmose pole preservative product does not strengthen the pole; it merely helps slow the deterioration process.[72] The Osmose preservative does not change the fact that the poles need to be replaced or repaired.[73] In addition, if these non-priority poles are presently in a "reliable state of service," ComEd has no basis for refusing access to them on the condition that Crown Castle pays to replace the pole.

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[69] Answer at 40, ¶ 35.

[70] *Id.*.

[71] Answer ¶ 61. ComEd does not cite any witnesses—or anything else—for this part of paragraph 61 discussing the preservative. The ComEd declarations that mention the Osmose treatment are Arns Decl. ¶¶ 10-11 (CEC88), D'Hooge Decl. ¶ 11 (CEC94), and Tyschenko Decl. ¶ 6 (CEC100).

[72] Bingel Reply Decl. ¶ 40.

[73] *Id.*

Again, these issues are ultimately irrelevant to whether ComEd can require Crown Castle to pay to replace red tagged poles, but as Mr. Bingel explains, ComEd's apparent policy in this regard is highly questionable and likely unreasonable and inappropriate.[74]

3. ComEd Policy Conflicts With Industry Standards And Good Engineering Practice

In his initial Declaration in support of the Complaint, Mr. Bingel explained that ComEd was not replacing poles in a timeframe that was consistent with standard industry practice.[75] ComEd attempts to take issue with Mr. Bingel's testimony by asserting that there can be no "industry standard" unless there is a published, "ANSI-accredited, consensus based" standard.[76] ComEd's argument is meritless. Expert witnesses regularly testify regarding standard industry practices, and those industry standards are not required to be published or adopted by some standards setting body.

An industry practice or standard does not need to be reduced to writing.[77] It is well established law that an expert witness may testify as to standard industry practices.[78] "'[It] is proper for an expert to testify as to the custom and standards of an industry, and to opine as to how a party's conduct measured up against such standards'"[79] Indeed, the Commission has

[74] Bingel Reply Decl. ¶¶ 39-44.

[75] Complaint Ex. E Bingel Decl. ¶¶ 13, 25.

[76] Answer ¶ 42.

[77] *See e.g.*, *Heabler v. Illinois Dep't of Fin. & Prof'l Regulation*, 987 N.E.2d 856, 863 (Ill. Ct. App. 2013).

[78] *See e.g.*, *Hynes v. Energy W., Inc.*, 211 F.3d 1193, 1205 (10th Cir. 2000); *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); *Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 509 (2d Cir. 1977).

[79] *In re Blech Sec. Litig.*, No. 94 CIV. 7696 (RWS), 2003 WL 1610775, at *19 (S.D.N.Y. Mar. 26, 2003) (citation omitted).

previously considered expert witness testimony on standard industry practices—that were not published—to determine whether a term and condition for attachment is just and reasonable.[80]

4. ComEd Will Not Permit Crown Castle To Reinforce Red Tagged Poles Despite Doing So Itself

ComEd continues to refuse Crown Castle's requests to reinforce, rather than replace, poles. ComEd admits that "from June 2017 to March 2019, ComEd would permit attachment to "red tag" poles only if Crown Castle replaced the pole, so that ComEd did not give Crown Castle the option to reinforce the poles."[81] However, ComEd admits that during this same time frame, when attaching ComEd's own facilities, it remedied such "red tag" poles "through reinforcement in some cases," rather than reinforcement.[82] As such, ComEd tacitly admits that such poles did not need to be replaced in every case, yet nevertheless required that Crown Castle do so. To this day, ComEd does not offer pole reinforcement as a standard option—it is only offered for select fiber only applications accepted into the "pilot" program.[83] For fiber applications on red tag poles, Crown Castle must either: (1) pay for full replacement of any red tag poles encountered; or (2) request that ComEd put the application in queue for processing through the "pilot," which will require the application to be tolled.[84] For node applications on red tag poles, the only option is for Crown Castle to pay for replacement.[85]

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[80] *Mile Hi Cable Partners, LP v. Pub. Serv. Co. of Colo.*, 17 FCC Rcd. 6268, 6271 (2002), *aff'd, Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[81] Answer ¶ 127.

[82] *Id.*

[83] Whitfield Reply Decl. ¶¶ 7-8.

[84] Whitfield Reply Decl. ¶ 8. The second group of Crown Castle applications in the "pilot" has been sitting unapproved since March; re-inspections were to have started July 18, 2019 (weather permitting). *Id.*

[85] Whitfield Reply Decl. ¶ 9.

5. Application Of The Osmose Pole Treatment Does Not Remedy Deteriorated Poles

As Mr. Bingel discusses in his reply declaration, ComEd repeatedly notes that when poles are declared "non-priority reject," they are treated with a product marketed by Osmose.[86] ComEd implies that this treatment somehow remedies or corrects the loss of strength that lead to the red tag status. However, that is inaccurate. Mr. Bingel explains that the Osmose pole treatment product merely treats the wood, essentially as a sealant, to help slow the rate of deterioration.[87] However, it does not in any way reinforce or strengthen the pole; it does not remedy or correct the fact that the pole has lost over 33% of its originally required strength.[88]

6. ComEd Does Not Provide Support For The Red Tag Replacement And Reinforcement Charges That It Cites In Its Answer

In its Complaint, Crown Castle specifies (i) the number of red tagged poles that ComEd required it to replace and reinforce, (ii) the total invoiced amounts to replace and reinforce said poles, and (iii) the total replacement and reinforcement charges that Crown Castle has paid as of April 30, 2019.[89] ComEd disagreed with these statistics and provided slightly different figures in its Answer.[90] However, ComEd did not submit adequate, or any, support for the red tag data that it alleges; ComEd merely relied on conclusory statements made in declarations.[91] Without providing sufficient evidence for its claims (*e.g.*, an itemized list of red tag invoices that ComEd believes it has issued to Crown Castle), Crown Castle cannot meaningfully address the

[86] Answer ¶¶ 35, 40-42, 52, 108-109, 114, 118, 119; Bingel Reply Decl. ¶ 39.

[87] Bingel Reply Decl. ¶ 40.

[88] *Id.*

[89] Complaint ¶¶ 43-46, 62-72.

[90] Answer pp. 50-51, 61-70.

[91] Answer Ex. I Herrera Decl., ¶¶ 4, 5, 6, 8; Answer Ex. K Mann Declaration, ¶¶ 4, 5, 6, 8.

discrepancies in red tag information submitted by the parties. More importantly, the Commission cannot accept as correct any of ComEd's assertions. Rule 1.721(d) requires that any assertion of fact must be "supported by relevant evidence."[92] A conclusory statement of fact with no supporting documentation—particularly where supporting documentation was provided by Crown Castle and readily available to ComEd—is not supported by relevant evidence. "A self-serving affidavit that simply reiterates the conclusory allegations of the complaint without other support is insufficient to raise a genuine issue of material fact."[93]

Nonetheless, in making a good faith attempt to reconcile the red tag data provided by the parties, Crown Castle identified some data entry errors in Attachment D, Exhibit 3 of its Pole Attachment Complaint, which provides list of red tag replacement and reinforcement invoices that ComEd issued to Crown Castle as of April 30, 2019 ("Red Tag Invoice Summary"). Attached to the Reply Declaration of Ms. Whitfield is a revised version of the Red Tag Invoice Summary, which reflects corrections to those data entry errors.[94] There are no meaningful or

[92] 47 C.F.R. § 1.7211(d).

[93] *See, e.g.*, *Wininger v. Searles*, No. CIVA 3:02CV747 WWE, 2006 WL 2839136, at *6 (D. Conn. Aug. 4, 2006); *Armstrong v. Potter*, No. 3:08CV1615 (HBF), 2010 WL 2584885, at *1 (D. Conn. June 21, 2010); *see also Brinson v. Conagra Foods, Inc.*, No. 8:08CV133, 2009 WL 606482, at *1 (D. Neb. Mar. 6, 2009) (refusing to consider an affidavit that repeated and reiterated the Complaint and other pleadings); *Borges v. City of Hollister*, No. C03-05670 HRL, 2005 WL 589797, at *9 (N.D. Cal. Mar. 14, 2005) (holding that declarations that merely repeated allegations in a complaint were insufficient to raise triable fact issue); *Christiana Bank & Tr. Co. v. Dalton*, No. 06-CV-3206 JS/ETB, 2009 WL 4016507, at *4 (E.D.N.Y. Nov. 17, 2009) ("But a self-serving, contradictory affidavit fails to raise a triable issue of fact when it conflicts with documentary evidence. Indeed, even when not refuted by clear documentary evidence (such as the signed mortgage papers here), self-serving, factually unsupported affidavits that merely parrot a complaint's allegations generally fail to raise triable issues of fact.").

[94] Whitfield Reply Decl. ¶ 5, Exh. 2. A previous version of this list was provided in Crown Castle's Pole Attachment Complaint, Attachment D – Declaration of Maureen A. Whitfield, Exhibit 3.

significant changes to the data. Indeed, because the parties continue to work in the field during the pendency of this case, as Crown Castle noted in the Complaint, the exact data regarding red tagged poles, and ComEd's failure to act in a timely manner, will constantly be in flux.[95] Indeed, Crown Castle is also providing updated data to reflect payments to ComEd for replacement or reinforcement of red tagged poles since the April 30, 2019 data used in the Complaint.[96]

IV. COMED ADMITS IT HAS NOT TIMELY PROCESSED CROWN CASTLE'S ATTACHMENT APPLICATIONS

A. ComEd Admits It Has Failed To Act Within The Appropriate FCC Review Timeframes

In response to Crown Castle's detailed and extensive evidence demonstrating that ComEd has not acted in a timely fashion in processing Crown Castle's applications, ComEd mostly raises minor disputes with Crown Castle's data. However, ComEd does not deny—and in fact, explicitly admits—that it has failed to act on hundreds of Crown Castle's fiber and wireless attachment applications involving thousands of poles.

ComEd repeatedly challenges the specific numbers of delayed applications provided by Crown Castle, but ComEd does not introduce any evidence to support its alleged contrary numbers. Instead, ComEd relies on conclusory statements by witnesses, with no supporting documentation and no details. For example, ComEd disputes Crown Castle's tally of the total number of fiber attachment applications that were pending as of April 30, 2019.[97] In support of its Complaint, Crown Castle had provided detailed tables identifying the applications it alleged were late.[98] But rather than supporting its contradictory numbers with citation to specific

[95] Complaint ¶¶ 67, 72-73.

[96] Whitfield Reply Decl. Exh. 1.

[97] Answer ¶ 83.

[98] Complaint ¶¶ 83-88, 91-99, 152-54, Whitfield Decl. Ex. 12, Application Processing Study.

application numbers, as Crown Castle had, ComEd simply cites to conclusory statements in Ms. Herrera's declaration that merely mirror ComEd's answer.[99] Because ComEd did not provide any data to back up its claims, Crown Castle is unable to evaluate these claims or check its own records to verify whether ComEd's "corrections" are accurate. Moreover, the Commission cannot rely on any of ComEd's assertions because they are unsupported by relevant evidence and data.[100]

However, even assuming, *arguendo*, the alternative application number counts provided by ComEd are accurate, ***these numbers still represent egregious violations of the FCC's rules***. ComEd's "alternative" numbers still reveal hundreds of applications, covering thousands of poles, where ComEd has failed to act for incredibly long periods of time. Thus, reviewing the numbers ComEd has provided, solely for the purposes of argument, demonstrates the extensive violations ***that ComEd itself admits***. Specifically, ComEd's Answer admits, that as of April 30, 2019:

Fiber attachment applications

- Crown Castle has submitted 748 fiber attachment applications (covering 8,075 poles) that are still pending without a permit being issued from ComEd;[101]

[99] Answer ¶ 83 (citing Herrera Declaration ¶ 18).

[100] *See supra* Section II; 47 C.F.R. § 1.721(d) (requiring that averred facts be supported by relevant evidence).

[101] Answer ¶ 83. In this instance and all the others like it, ComEd simply states—without any explanation or support—that rather than the 836 applications Crown Castle contends are still pending, there are instead only 748 applications. In the Herrera Declaration paragraph 18, which ComEd cites in support, Ms. Herrera merely restates the exact same sentence as in ComEd's Answer, with no explanation or supporting data. Answer Ex. I Herrera Decl. ¶ 18.

- ComEd has failed to complete pre-construction surveys for 13 fiber attachment applications within 60 days;[102] one of which ComEd admits has been pending for over 262 days;[103]
- ComEd has failed to complete make-ready estimates for 387 fiber attachment applications for more than 74 days;[104] one of which has been pending for 345 days;[105]
- 482 of Crown Castle's fiber attachment applications have been pending for more than 193 days.[106]

Wireless attachment applications

- Crown Castle has submitted 783 wireless attachment applications that are still pending without a permit being issued from ComEd;[107]
- ComEd has failed to complete pre-construction surveys for 37 wireless attachment applications within 60 days;[108]
- ComEd has failed to complete make-ready estimates for 322 of Crown Castle's wireless attachment applications for more than 74 days;[109] one of which has been pending for over a year;[110]

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[102] Answer ¶ 84.

[103] *Id.* ¶ 85. ComEd claims no payment has been received for the overdue attachment application. *Id.* Without any detailed information regarding the application to which ComEd refers, Crown Castle cannot verify ComEd's claim of nonpayment.

[104] *Id.* ¶ 86. In this response, and many others like it, ComEd seeks to spin its admission with a remarkable use of the word "only." For example, in this paragraph, ComEd states that rather than the "446" applications alleged by Crown Castle as being beyond the 74-day timeframe for make-ready estimates, "*only 387*" applications are beyond the 74 days. *Id.* (emphasis added). Adding the word "only" does not somehow make 387 overdue fiber applications, representing thousands of poles, an acceptable number of applications for ComEd to delay.

[105] *Id.* ¶ 87. ComEd blames the failure to complete a make-ready survey for this application, number 18-0899-CN, for nearly a year is due to a pilot program to determine whether it can be reinforced rather than replaced. However, Crown Castle did not request that the application be made part of the "pilot program." Whitfield Reply Decl. ¶ 10. ComEd added the application to the pilot program without asking Crown Castle or telling Crown Castle it had done so until April 15, 2019. Whitfield Reply Decl. ¶ 10.

[106] Answer ¶ 88. This is a perfect example of where Crown Castle has no way of evaluating or responding to the substance of ComEd's claimed reduction in the number of applications that have been pending because ComEd provides no supporting data.

[107] *Id.* ¶ 92.

[108] *Id.* ¶ 93.

[109] *Id.* ¶ 94.

[110] *Id.* ¶ 95.

- 156 of Crown Castle's wireless attachment applications have been pending for more than 223 days;[111] 71 of which have been pending for over nine months[112] and six of which have been pending for over a year.[113]

The above figures are indisputable because ComEd itself admits them in its Answer. And critically, the numbers indicate that, even if ComEd's rebuttal data were accurate, which Crown Castle disputes, the abuses are outrageous and widespread. Moreover, as Crown Castle illustrates below, ComEd attempts to excuse these flagrant violations of the FCC's rules, but its excuses are meritless.

Having said that, it is critical to emphasize again that none of ComEd's numbers can be verified and frequently are not responsive to Crown Castle's allegations in the Complaint. For example, in paragraph 88 of the Complaint, Crown Castle alleged "Ultimately, ComEd has failed to take final action on 579 of the 836 pending fiber applications (covering 6,701 poles) within the 193 days required under even the longest scenario in the Commission's Rules."[114] ComEd's response is a series of assertions that are not even related to the allegation that 579 fiber applications have not been acted on within 193 days. ComEd states "Out of the 446 attachment applications listed in Attachment D, Exhibit 12 of Crown Castle's Complaint, three applications have been cancelled by Crown Castle; two applications are on hold pending updated information from Crown Castle; 59 applications require payment from Crown Castle; and less than 193 days elapsed between the date of submission and April 39, 2019 for 33 applications."[115] Yet, ComEd

[111] *Id.* ¶ 96.

[112] *Id.* ¶ 97.

[113] *Id.* ¶ 98.

[114] Complaint ¶ 88.

[115] Answer p. 73 ¶ 88.

provides not a single detail of evidence to support any of the allegations.[116] It does not provide application numbers for the three that were allegedly cancelled, the two that were allegedly on hold, or the 59 that allegedly require payment from Crown Castle—nothing. What is more, the reference to 446 applications is the number of applications that did not have make ready done with 74 days.[117] ComEd's response is addressing a different issue. Without supporting details, neither Crown Castle nor the Commission can verify the accuracy of ComEd's assertions, much less attempt to respond to them. The same is true for every other ComEd response regarding the number of applications on which ComEd has failed to act timely under the Rules.[118] As discussed above, unsupported, conclusory statements by ComEd witnesses parroting the conclusory statements in the Answer do not constitute evidence to support ComEd's Answer.

Ultimately, the exact number of applications that ComEd has *currently* failed to process in a reasonable time under the Commission's Rules will be constantly changing. The critical issue is that ComEd has unquestionably failed to act in a timely manner, and the Commission should issue an order remedying that failure by allowing Crown Castle to control contractors and schedules.

B. ComEd's Excuses For Failure To Act In Timely Manner Do Not Justify Its Violations

Because ComEd admits that it has not acted in a timely fashion, as detailed in Section IV.A above, it attempts to explain away its extensive failures to act on Crown Castle's applications. As detailed below, however, each of ComEd's excuses fails to justify its failure to act within the appropriate timeframes.

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[116] Answer Ex. I, Herrera Decl. ¶ 28.

[117] Complaint Ex. D, Whitfield Decl. Exh. 12.

[118] *See, e.g.*, Answer ¶¶ 83-86, 92-99.

1. Although Not Required, Crown Castle Provided Reasonably Accurate Application Forecasts In Good Faith

As discussed in the Complaint, to assist ComEd in anticipating the volume of applications Crown Castle planned to submit for this project, Crown Castle provided estimated forecasts of the quantity of applications it planned to submit to ComEd.[119] ComEd, however, contends that Crown Castle's forecasts were "inaccurate and unreliable" because of the purported variance between Crown Castle's forecast and actual numbers.[120] As a threshold matter, Crown Castle was not required to provide such forecasts at all. Nothing in the Commission's Rules requires Crown Castle to provide ComEd forecasts, much less spot-on accurate forecasts. Nonetheless, Crown Castle provided estimates in good faith to allow both parties to plan appropriately and to facilitate Crown Castle's deployment.[121]

ComEd also misrepresents the evidence regarding the forecast provided by Crown Castle. First, the table ComEd produces in its Answer is based on a table Crown Castle initially provided in January 2018.[122] However, ComEd has taken editorial liberties with the table; namely, Crown Castle provided estimated pole counts alongside its projected application counts.[123] Yet, ComEd claims that "the number of projected applications proves to be little value ***as an application can be for one pole or many poles*** . . . ."[124] Given that Crown Castle provided ComEd with projected pole counts alongside its application counts, ComEd's claim is disingenuous.

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[119] Complaint Ex. D, Whitfield Decl. ¶ 46, Exs. 10-11.

[120] Answer ¶ 76.

[121] Complaint Ex. D, Whitfield Decl. ¶ 46, Exs. 10-11.

[122] Whitfield Reply Decl. ¶ 11; Complaint Ex. D, Whitfield Decl. Ex. 11 (CCF235).

[123] Complaint Ex. D, Whitfield Decl. Ex. 11 (CCF235).

[124] Answer ¶ 76 (emphasis added).

Next, further demonstrating Crown Castle's efforts to provide the most useful data in light of the circumstances, Crown Castle provided ComEd with updated forecasts in June 2018.[125] Finally, ComEd bears responsibility for some of the monthly variability between estimate and actual figures due to the fact that ComEd could not keep pace with account number requests in Spring 2018. Essentially, ComEd requires Crown Castle to submit a request for application numbers *before it can even apply*.[126] Crown Castle was initially told to expect new account numbers to be issued within two weeks of a request (which itself violates the Commission's timeline rules); however, by mid-June 2018, ComEd was over two months behind in issuing account numbers.[127] On average, it is taking two to four weeks for ComEd to issue an account number.[128] ComEd's inability to keep pace with Crown Castle's account number requests delayed Crown Castle's ability to submit applications in a timely manner and in better adherence to the forecasts provided.[129]

Ultimately, a forecast is a prediction based on available data—not an outright guarantee of future action. Thus, some variance is to be reasonably expected between Crown Castle's predicted application volume and filing its actual applications. And contrary to ComEd's

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[125] Whitfield Reply Decl. Ex. 5 (June 19, 2018 email from M. Whitfield to M. Mann).

[126] Whitfield Reply Decl. ¶ 13.

[127] Whitfield Reply Decl. ¶ 14, Ex. 6 (June 19, 2018 email from M. Whitfield to T. Holmes and L. Hagerman re account numbers). Crown Castle did not anticipate needing much advance notice for account numbers for two reasons: (1) ComEd represented that account numbers took two weeks to process, and (2) ComEd advised Crown Castle that if account numbers aged more than 30 days with no activity, they were canceled, meaning that typically Crown Castle would only request account numbers within four to six weeks of its application submission schedule so that the account numbers would not be canceled prior to submitting applications. Whitfield Reply Decl. ¶ 13.

[128] Whitfield Reply Decl. ¶ 15.

[129] The very requirement that Crown Castle file such a "pre-application" request is a clear violation of and attempt to circumvent the Commission's timeline rules.

suggestions, Crown Castle's projections fell within a reasonable range as evidenced by the chart ComEd provides in its Answer. For example, between June and November, the variance between projection and actual was (24%,), (4%), (3%), 2%, 12%, and 19%.[130] These variances reveal significant accuracy for "predictions."

Most importantly, these projections gave ComEd advanced notice of incoming applications so that ComEd could efficiently organize its resources. ComEd's failure to make appropriate staffing decisions to enable it to handle Crown Castle's applications in *any* volume is apparent based on the significant delays Crown Castle has reported. Consequently, ComEd's contention that such forecasts were unusable is unconvincing in light of Crown Castle's good faith efforts to provide these estimates and because the data show that the variance itself was reasonable.

2. The Commission Has Rejected Insufficient Utility Staffing As An Excuse For Delay

The Commission has specifically rejected certain of the excuses ComEd provides for its delinquent application processing timeframes. While the Commission's timelines for make-ready and construction typically dictate the appropriate timeframe in which a utility must process an attachment application, the Commission recognized that there could be circumstances in which it would be appropriate to stop the clock, including emergencies and other events "beyond a utility's control."[131] The Commission accordingly adopted a "good and sufficient cause" standard "under which a utility may toll the timeline for no longer than necessary where conditions render it infeasible to complete the make-ready work within the prescribed

[130] Answer ¶ 76.

[131] *2011 Order* ¶¶ 62, 68.

timeframe," including dealing with an emergency requiring "federal disaster relief."[132] However, the Commission specifically forbid utilities from stopping the clock for "routine or foreseeable events," including "repairing damage caused by routine seasonal storms," as well as "***alleged lack of resources***."[133]

Nonetheless, in an attempt to excuse its failure to timely process applications, ComEd submits that it only had "four full time equivalent employees" to process third party attachments in 2018, but has since added staff to review applications.[134] ComEd's excuse/explanation is irrelevant. The Commission has specifically rejected a utility's lack of staffing resources as not being "good and sufficient cause" to stop the Commission's shot clock deadlines.[135] ComEd's excuses that it was unprepared for routine storms also is unconvincing and has similarly been rejected by the Commission.[136] ComEd asserts that it sent its crews out of state for hurricane rebuilding efforts, "experienced its own storm in late November," an "abnormally wet spring," and "six internal storm recovery activations."[137] ComEd implies that these events meant that it could not complete third-party engineering and make-ready estimates or process applications on time—in spite of Crown Castle's various proposals to assist by supplying additional third party contractors.[138] As the Commission has established, such foreseeable, routine storm activity does

[132] *Id.* ¶ 68.

[133] *Id.* (emphasis added).

[134] Answer ¶ 75.

[135] *2011 Order* ¶ 68.

[136] *Id.*

[137] Answer ¶ 75.

[138] Complaint ¶¶ 79-81 (citing Whitfield Decl. ¶¶ 50-51, Exs. 14-15).

not excuse ComEd's significant, widespread application processing delay according to the FCC's determination and are not "good and sufficient cause" to stop the shot clock.

3. ComEd's Refusal To Allow Crown Castle To Control Contractors Directly Is Unreasonable And Contributing To Delay

As explained in the Complaint, Crown Castle has offered a practical, "turnkey" solution to alleviate ComEd's delay in application and make-ready processing in which Crown Castle would hire and control the contractors.[139] However, ComEd has steadfastly refused Crown Castle's efforts to assist with ComEd's deficient timeframes.

The Commission has emphasized the importance of attacher self-help remedies to ensure timeframes are met in the face of utility intransigence or lack of resources. In the *2011 Order*, the Commission adopted a remedy permitting attachers to obtain access to poles if a utility failed to act within the FCC deadlines. The Commission found it was

> reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow [a]ttachers to hire approved outside contractors.[140]

Recognizing that "time is of the essence" for an attacher's business success, the Commission held that where a pole owner "lacks the resources or the will to perform make-ready, the prospective attacher may pursue the project through any lawful means, including use of additional resources."[141]

Crown Castle's "turnkey" proposal to hire and control contractors is consistent with the key objectives the Commission set forth in the *2011 Order*; namely, promoting access to

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[139] *See* Complaint ¶ 79. Crown Castle also proposed to add a contractor to ComEd's approved list. *Id.* ¶ 80.

[140] *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, ¶ 50 (2011) ("*2011 Order*") (concurring with and quoting the Public Service Commission of New York).

[141] *Id.* ¶¶ 50-51.

necessary infrastructure in a timely manner.[142] By failing to take action on hundreds of Crown Castle's attachment applications, ComEd has shown that it is unable or unwilling to meet the deadlines imposed by the FCC. In response, Crown Castle has proposed to hire, control, and direct ComEd-approved third party contractors in completing pre-construction surveys and make-ready estimates.[143] ComEd, however, has refused to allow Crown Castle to do so, while still failing to meet appropriate timeframes.[144]

In adopting its one-touch make-ready ("OTMR") pole attachment regime, the Commission revisited the self-help remedy from the *2011 Order*. The Commission's OTMR rules are even more specific in recognizing the importance of allowing the attaching party to control the process.

The Commission also adopted a new requirement, whereby utilities maintaining a list of qualified contractors are required to permit attachers to request the addition of contractors that meet certain qualifications to the utility's list, emphasizing that "utilities ***may not unreasonably withhold consent*** to add a new contractor to the list."[145] The Commission explained that this requirement so that a utility would not be able to stymie broadband deployment, which is contrary to the goals of the *OTMR Order*.[146] The Commission further explained that:

> To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and

[142] *See* Complaint ¶ 79; Complaint Ex. D, Whitfield Decl. ¶¶ 50-51.

[143] Complaint ¶ 79.

[144] *Id*.

[145] *OTMR Order* ¶ 38.

[146] *Id.* Unfortunately, due to conditions on ComEd's poles, the vast majority of Crown Castle's proposed fiber attachments are not eligible for OTMR because the required make-ready would be complex under the Commission's rules.

> based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.[147]

In other words, the Commission held that a utility's decision to withhold consent must be reasonable, fair, and fact-based to prevent a utility from dragging its feet, depriving the attacher of the opportunity to avail itself of a crucial self-help remedy and further delaying broadband deployment.

Attempting to pursue the Commission's new remedies, on May 29, 2019, Crown Castle requested that ComEd approve Thayer Power & Communication as an approved third party contractor.[148] To date, nearly two months after Crown Castle's initial request to approve Thayer Power & Communication, ComEd has still not granted or denied Crown Castle's request.[149] ComEd's decision to withhold its consent to grant or deny Crown Castle's request is unreasonable based on the factors set forth by the FCC because ComEd has not promptly issued a basis for rejection in writing.

Ultimately, ComEd's actions and positions make clear that it is critical for Crown Castle to control all aspects of the process. ComEd has demonstrated that it cannot be trusted to act in a timely manner.

C. ComEd's Claimed "300%" Productivity Increase Is Inaccurate And Unsupported

ComEd's claim of a recent increase in application processing productivity is unsupported by any evidence and should be discarded. In response to Crown Castle's concrete evidence of ComEd's delay, ComEd claims that "May-June [2019] completions were 300% higher for

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[147] *OTMR Order* ¶ 38.

[148] Complaint ¶ 80.

[149] *Id.* ¶ 81 (citing Whitfield Decl. Ex. 15).

Crown Castle than the first four months of 2019."[150] First, again, ComEd has not supported this claim, except with a citation to Mr. Mann's declaration, which simply repeats the same conclusory statement as the Answer.[151] ComEd provides no data to back up this claim, which means that neither the Commission nor Crown Castle has the ability to verify ComEd's assertion.

Even if ComEd's assertion were taken at face value, in the absence of any supporting data for ComEd's 300% figure, neither Crown Castle nor the Commission can tell whether ComEd's claimed increase in application reviews was simply part of the warmer late spring weather that allows for more make-ready completion, or whether it was due in part to Crown Castle filing its complaint in this matter, which ComEd was notified of via letter requesting final executive level negotiation on April 26, 2019.[152] In other words, ComEd may have stepped up production in the face of this complaint proceeding.

Moreover, although Crown Castle has no way of knowing the basis for ComEd's allegation, it is critical to keep in perspective that even a 300% increase in processing (assuming it is true) is not a meaningful or relevant number when the original processing speed was nearly non-existent. In other words, a 300% increase in a prior processing rate of only 2 applications per week, for example, is still only 6 applications per week out of hundreds.

In any case, because there is no evidence supporting the alleged increase in processing speed, the Commission should disregard ComEd's unsupported allegation of increased productivity.

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[150] Answer ¶ 67.

[151] Answer ¶ 67 (citing Ex. K, Mann Declaration ¶ 16).

[152] Complaint Ex. D, Whitfield Decl. ¶ 55, Ex. 17.

D. Crown Castle Application Prioritization Is Not A Legitimate Excuse For ComEd's Processing Delay

ComEd also argues that because, during its weekly meetings with Crown Castle, Crown Castle sometimes reprioritized certain of its applications, it "had the effect of delaying ComEd's completion of other pending ***aged*** applications."[153] This argument is meritless.

It is true that Crown Castle has at times prioritized applications out of chronological sequence. However, such application prioritization was offered by ComEd as a "solution" to ComEd's application review delay to assist Crown Castle in meeting its delivery targets.[154] Indeed, such prioritization is routine; ComEd states that it "works with all Third Party Attachers to prioritize their work."[155] This "solution," however, was necessitated by ComEd's significant application processing delays. In many cases, Crown Castle was prioritizing applications that were already well past the relevant review timeframe, so Crown Castle was asking ComEd to prioritize a "less past due" application over a different past due application. Crown Castle shuffling the order of past due applications does not excuse the fact that ComEd did not timely process the applications in the first place; indeed, no such "solution" would be necessary if ComEd acted in a timely manner. In cases where Crown Castle prioritized applications that were *not* past due over ones that were past due, it was done for critical fiber routes that would better enable Crown Castle to construct its network and was done in an effort to address construction shortcomings caused by ComEd's processing delays. In either case, the reprioritization was caused by ComEd's failure to act; as such, it cannot legitimately excuse ComEd's application processing delay.

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[153] Answer ¶ 78 (emphasis added).

[154] Whitfield Reply Decl. ¶ 17.

[155] Answer ¶ 99.

If anything, Crown Castle's requests for reprioritization are a reflection of the significant adverse impact ComEd's delay is having on Crown Castle's customer relationships.

E. Crown Castle's Evidence Regarding Its Turnkey Solution Is Admissible

In its Complaint, Crown Castle explained that ComEd rejected Crown Castle's proposed "turnkey" solution to hire and control contractors, as detailed in Section V.B.3 above. In doing so, Crown Castle provided specific information. In response, ComEd does not deny the allegation, but rather merely objects to the allegation, asserting it is "based on inadmissible hearsay evidence."[156] In all three instances, the statement that ComEd claims is "hearsay" is sourced to paragraph 51 of Ms. Whitfield's declaration, which states:

> Isaac Akridge of ComEd rejected the "turnkey" proposal at the meeting on November 2, 2017, explaining that ComEd did not want Crown Castle to exercise control over third-party contractors.[157]

As a ComEd employee, Mr. Akridge's statement is not hearsay.

Federal Rule of Evidence 801(d)(2)(D) provides that a statement is not hearsay where:

> The statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed . . . .[158]

Ms. Whitfield's statement is being offered against ComEd, an opposing party, and was made by ComEd's employee on a matter within the scope of the parties' existing relationship. Because Ms. Whitfield's statement meets the requirements of Rule 801(d)(2)(D), it is not hearsay and ComEd's statement to that effect is misplaced.

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[156] Answer ¶¶ 79, 90, 161.

[157] Complaint Ex. D, Whitfield Decl. ¶ 51.

[158] Fed. R. Evid. 801(d)(2)(D).

Ultimately, as noted, ComEd does not deny that Crown Castle made the proposal or that ComEd rejected it. ComEd's response is a meritless evidentiary objection, and thus the allegation is established.

RESPONSE TO AFFIRMATIVE DEFENSES

V. COMED'S AFFIRMATIVE DEFENSES ARE MERITLESS

A. The FCC Has Jurisdiction Over This Complaint

After briefing from the parties, the Enforcement Bureau determined in a July 15 Order that it has jurisdiction to hear and decide Crown Castle's Complaint. Consequently, ComEd's arguments to the contrary are misplaced.[159] In response to ComEd's continued insistence that the Commission lacks jurisdiction to decide Crown Castle's Complaint, Crown Castle hereby incorporates herein by reference the arguments set forth in its opposition to ComEd's motion to dismiss without repeating them here.[160]

B. Crown Castle Provides Telecommunications Service

ComEd's affirmative defense arguing that Crown Castle does not provide telecommunications service is meritless.[161] As a threshold matter, Crown Castle's status as a provider of telecommunications service has been confirmed by the ICC through its issuance of a Certificate of Service Authority.[162] ComEd cannot now collaterally attack the ICC's determination. The Commission has held the issuance of a Certificate by a state expert agency is

[159] Answer pp. 1-2 (Affirmative Defense ¶ 1).

[160] Crown Castle Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction, Proceeding No. 19-169, Bureau ID No. EB-19-MD-004 (filed July 8, 2019); Crown Castle Opposition to Respondent's Motion to Hold Proceedings in Abeyance, Proceeding No. 19-169, Bureau ID No. EB-19-MD-004 (filed July 8, 2019) (attached hereto as Attachment C).

[161] Answer pp. 6-10 (Aff. Def. ¶¶ 15-27).

[162] Complaint ¶ 5.

prima facie evidence that a company is a telecommunications provider for purposes of the Act, and companies are entitled to rely on expert agency decisions establishing their status.[163] In addition, several courts have recognized that Crown Castle provides telecommunications services, including service provided via distributed antenna system ("DAS") networks, which networks are described in detail below.[164]

Nonetheless, to demonstrate beyond question that it is a telecommunications provider, Crown Castle provides the following response.[165]

Crown Castle's existing and planned facilities attached to ComEd's utility poles in Illinois will be used to provide a variety of telecommunications services to enterprise, institutional, governmental, educational, and carrier customers throughout the state.[166] The federal Communications Act ("Act") defines "telecommunication service" as

> The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[167]

[163] *See Fiber Techs. Networks v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd. 3392, 3396 (2007).

[164] *See, e.g., Crown Castle NG Atl. LCC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355, at *3 (E.D. Va. Aug. 8, 2016) ("Crown Castle is a corporation that provides telecommunications services . . . ."); *NextG Networks of New York, Inc. v. City of New York*, No. 03 CIV 9672 RMB/JCF, 2006 WL 538189, at *1 (S.D.N.Y. Mar. 6, 2006), *aff'd in part, rev'd in part sub nom. NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49 (2d Cir. 2008) (describing NextG Networks of NY, Inc., a predecessor to Crown Castle, as "a provider of telecommunications services"); *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 188 A.3d 617 (Pa. Commw. Ct. 2018) ("DAS network operators' transport service . . . is a telecommunications service . . . ."), *appeal granted*, 200 A.3d 7 (Pa. 2019).

[165] ComEd's argument that Crown Castle does not require access to ComEd's poles is meritless. Answer ¶ 22. Crown Castle is not required to prove that it has no other options. Section 224(f) grants it a right of access to ComEd's poles. 47 U.S.C. § 224(f).

[166] Declaration of Donald Russell ("Russell Decl.") ¶¶ 4, 12 (attached hereto as Attachment D).

[167] 47 U.S.C. § 153(53).

Similarly, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[168] Crown Castle's service offerings utilizing attachments to ComEd poles consist of providing transport of Crown Castle's customers' communications between fixed points designated by the customers without alteration of the content of the communications.[169] Crown Castle offers its services for a fee directly to the public, as defined by federal law.[170] Therefore, Crown Castle's service meets the federal definition of "telecommunication service."

1. Crown Castle Is Providing Common Carrier Telecommunications Services

ComEd incorrectly asserts that because Crown Castle provides its services "with individual terms and conditions on a private carrier basis," it is not a common carrier and thus is not providing telecommunications service.[171] Yet, it is well-established that the Act does not require Crown Castle to serve the entire universe of consumers to qualify as a common carrier. Indeed, specialized transport of use to only a limited universe of consumers or wholesale service to a limited universe of other carriers who then provide retail service clearly qualify as a telecommunications service. For example, in analyzing the phrase "to the public," as used in the Act, the United States Court of Appeals for the District of Columbia Circuit explained over 40 years ago:

> This does not mean that the particular services offered must practically be available to the entire public; ***a specialized carrier whose service is of possible***

[168] 47 U.S.C. § 153(50).

[169] Russell Decl. ¶ 4.

[170] Russell Decl. ¶ 4.

[171] Answer pp. 9-10 (Aff. Def. ¶ 25).

> ***use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to service indifferently all potential users***.[172]

All that is required to qualify as a telecommunications service under the Act is for a carrier to serve "indiscriminately . . . the clientele [it is] . . . suited to serve."[173] Crown Castle's telecommunications service, including its "RF transport service," is offered on a wholesale basis to all potential users (for RF transport service, potential users include interested wireless carrier-customer) and Crown Castle's enterprise fiber services are also offered to the relevant universe of potential users. Consequently, Crown Castle is acting as a common carrier in Illinois and is providing telecommunications service. Under the Commission's *Fiber Tech* decision, Crown Castle is entitled to rely on its certificate.

2. Crown Castle's Antennas Are An Integrated Part Of Its RF Transport Telecommunications Service And Are Thus Subject To The Commission's Jurisdiction

While the majority of the fiber Crown Castle has deployed and plans to deploy on ComEd's poles will provide telecommunications service to enterprise customers, Crown Castle also plans to provide a telecommunications service called "RF transport service."[174] "RF transport service" is essentially a trade name that refers to the fact that Crown Castle is transporting, via its fiber optic lines, the radio frequency ("RF") signals of its customers, who are themselves providers of wireless services.[175] "RF transport," however, does not refer to transport

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[172] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (emphasis added).

[173] *Consol. Commc'ns of Fort Bend Co. v Pub. Util. Comm'n of Tex.*, 497 F. Supp. 2d 836, 843 (W.D. Tex 2007), *aff'g Petition of Sprint Comm Co LP*, 2006 WL 2366391 (Tex. PUC, Aug 14, 2006) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

[174] Complaint ¶ 7.

[175] Russell Decl. ¶¶ 5-7.

over the air via radio frequencies.[176] Instead, Crown Castle provides RF transport service between points chosen by its customers using fiber optic lines that are configured in what are sometimes called Distributed Antenna System ("DAS") or small cell networks.[177] With its RF transport service, Crown Castle transports communications for customers over Crown Castle's terrestrial, fiber optic lines between remote "Nodes" located on poles in the public rights of way and a central "Hub" location.[178] The equipment comprising a typical Node in Crown Castle's DAS and small cell networks commonly includes a small, low-power antenna, laser, and amplifier equipment for the conversion of radio frequency, or "RF," signals to optical signals (or vice versa), fiber optic lines, and associated equipment (such as power supplies).[179] The Hub, located on the other end of the fiber optic line from the Node, is a central location that contains such equipment as routers, switches, and signal conversion technology.[180]

Crown Castle's customers for this RF Transport service are generally companies that provide retail wireless service to consumers.[181] These retail wireless carriers, which are also known as "commercial mobile radio service" ("CMRS") carriers, are the entities that hold licenses from the FCC to use and control radio frequencies.[182] CMRS carriers are the entities that provide personal wireless service to end-user wireless customers.[183] All radio transmissions and wireless services are generated and controlled by the wireless carrier-customer through its

[176] *Id.* ¶¶ 9, 11.

[177] *Id.* ¶ 5.

[178] Russell Decl. ¶ 7.

[179] *Id.* ¶ 7.

[180] *Id.* ¶ 8.

[181] *Id.* ¶ 6.

[182] *Id.* ¶ 9.

[183] *Id.* ¶¶ 6, 9.

equipment that is commonly located at the Hub.[184] Once Crown Castle has transported a communication over its terrestrial, fiber optic facilities to the antenna at the Node, the communication is converted back to an RF signal, but the CMRS carrier-customer controls and furnishes that wireless transmission to its own end-user customer's mobile device.[185]

In its Answer, ComEd presents a meritless argument that because Crown Castle is not itself providing wireless telecommunications service using its antenna attachments, such wireless attachments are therefore "unregulated" and not subject to the federal Pole Attachment Act.[186] Crown Castle explained that to deploy facilities that deliver RF transport service it "attaches equipment that is 'wireless' in nature, as well as equipment that is 'wireline' in nature to ComEd poles."[187] However, contrary to ComEd's claims, the fact that Crown Castle does not provide a "wireless" service means it cannot avail itself of federal pole attachment rights. While the telecommunications *service* it provides—RF transport—is wireline in nature, Crown Castle attaches both wireline (fiber) and wireless (antenna) *facilities* to ComEd poles to deliver such service.[188] ComEd is thus correct that Crown Castle has consistently argued before this Commission and before other courts that Crown Castle itself does not provide CMRS service. However, while Crown Castle does not furnish CMRS, its antenna attachments are an integral part of Crown Castle's RF transport service and are thus covered by Section 224.

Federal law defines "pole attachment" broadly as "***any attachment*** by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned

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[184] *Id.* ¶¶ 8-9.

[185] *Id.*

[186] Answer pp. 2-6 (Aff. Def. ¶¶ 2-14).

[187] Complaint ¶ 7.

[188] Russell Decl. ¶¶ 7-11.

or controlled by a utility."[189] The Act does not discriminate based on the type of attachment, so long as the attachment is placed by a "provider of telecommunications service," such as Crown Castle.[190] The Commission has repeatedly affirmed this interpretation of the Act. In *Heritage Cablevision Associates of Dallas*, the Commission rejected arguments attempting to limit the protections of Section 224 by limiting its purview to a particular type of service or facilities, finding that "a cable operator may seek Commission-regulated rates for ***all*** pole attachments within its system, ***regardless of the type of service provided over the equipment attached to the poles***."[191] The Commission went on to explain that:

> TU Electric, in effect, urges us to find that Congress intended the Commission to address utility misconduct only to the extent that such abuse affects the provision of traditional cable television services to the public, thus leaving utilities free to exercise their monopoly ownership of poles to frustrate attempts by cable operators to expand their service offerings . . . . ***Nothing in the legislative history supports a conclusion that protecting traditional cable television services was Congress's exclusive concern,*** however. While there is no extensive or definitive discussion of this issue in the legislative history, the Senate report specifically referenced testimony "that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future."[192]

The D.C. Circuit affirmed the Commission's decision in *Heritage*, holding that the Commission reasonably interpreted the statutory language to determine that it could regulate pole attachment rates charged by a utility for attachments providing nonvideo service.[193]

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[189] 47 U.S.C. § 224(a)(4) (emphasis added).

[190] 47 U.S.C. § 224(a)(4).

[191] *In re Heritage Cablevision Assocs. of Dallas, L.P.*, 6 FCC Rcd. 7099, 7101 ¶ 12 (1991), *aff'd, Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (emphasis added).

[192] *Heritage Cablevision*, 6 FCC Rcd. at 7102 ¶ 16 (emphasis added).

[193] *Texas Util. Elec. Co.*, 997 F.2d at 936 ("[I]t is consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system.")

In *Selkirk Communications*, the Commission again held that Section 224 covered attachments by cable television operators of equipment used to provide nonvideo services.[194] In 1997, the Commission recognized that the passage of the Telecommunications Act of 1996 affirmed its holdings in *Heritage* and *Selkirk* by amending Section 224 to include providers of telecommunications services.[195]

Ultimately, in the 2011 Pole Order, the Commission recognized that Section 224 and the Commission's pole attachment rules, including rate formulas, apply to DAS networks, such as Crown Castle's.[196]

Crown Castle has been established as a provider of telecommunications services. Moreover, its wireless antenna attachments are an integral part of one type of telecommunications service that Crown Castle provides, called RF transport service.[197] It is thus immaterial whether Crown Castle is utilizing the antennas to provide over-the-air wireless telecommunications service, itself, because Crown Castle incorporates the antennas in its network to provide RF transport service, a wireline telecommunications service. Consequently, because the Commission has jurisdiction to regulate *any* attachment placed by a "provider of telecommunications service," the wireless antenna attachments integral to Crown Castle's DAS and small cell networks and crucial to Crown Castle's RF transport service are thus subject to the

[194] *In re Selkirk Commc'ns, Inc.*, 8 FCC Rcd. 387 (1993).

[195] *See In re Marcus Cable Assocs., L.P.*, 12 FCC Rcd. 10362, 10367-68 (1997).

[196] *See, e.g., 2011 Order* at ¶¶ 6 n.13 (access for DAS), 21 n.69 (timelines apply to DAS), 77 n.226 (pole top available for DAS), Separate Statement of Chairman Genachowski ("It also provides a timeline for accessing the tops of poles, which are key for the deployment of wireless broadband technologies like distributed antenna systems. . .").

[197] Russell Decl. ¶ 11.

Commission's jurisdiction whether or not the antennas themselves are used by Crown Castle to provide wireless telecommunications service.

3. Crown Castle Is Not Required To Maintain A Tariff To Qualify As A Telecommunications Carrier

ComEd also argues that Crown Castle is not a telecommunications carrier because the Complaint "does not include or reference any tariff on file in Illinois to govern the services provided by Crown."[198] ComEd's argument is meritless because Illinois law does not require Crown Castle to maintain a tariff. Crown Castle is a competitive telecommunications provider that has de-tariffed in accordance with the ICC's rules. Pursuant to Illinois Public Utility Act ("PUA") Section 13-501 and the ICC's August 3, 2013 memorandum,[199] Crown Castle submitted a letter on November 2, 2016 withdrawing its prior tariff issued under its previous name RCN New York Communications, LLC d/b/a RCN Metro Optical Networks.[200] Because Crown Castle has de-tariffed in accordance with relevant law, a tariff is not required to comply with the ICC's regulations, and ComEd's argument should be rejected.

C. Crown Castle Is The Proper Party To This Proceeding

ComEd also seeks to take issue with whether Crown Castle is the proper party to bring this Complaint. ComEd argues that Crown Castle does not have a Certificate from the ICC. It also argues that Crown Castle is not a party to any of the three pole attachment agreements, and that ComEd never received notice of any transfer to Crown Castle.[201] ComEd's arguments are meritless. As demonstrated below, Crown Castle is the proper party to the three pole attachment

[198] Answer p. 9 (Aff. Def. ¶ 23).

[199] A copy of the ICC's August 3, 2013 memorandum is attached hereto as Attachment E.

[200] A file stamped copy of the letter is attached hereto as Attachment F.

[201] Answer pp. 11-14 (Aff. Def. ¶¶ 28-33).

agreements as the result of various corporate events, none of which has ever constituted a transfer or assignment that triggered the notice and consent provisions of the pole attachment agreements. Moreover, ultimately, even if some corporate event had technically triggered the provision requiring notice and consent to ComEd, ComEd has no basis to have ever denied consent, and ComEd's admission that for the past two years it has granted Crown Castle attachment to hundreds of poles undercuts its argument that Crown Castle has no rights under any of the pole attachment agreements identified in the Complaint.

1. Crown Castle Fiber LLC Is Authorized To Provide Telecommunications Services In Illinois Pursuant To Certificates Of Service Authority Obtained By RCN New York Communications, LLC

In 2007, the ICC granted RCN New York Communications, LLC ("RCN") a Certificate of Interexchange Service Authority to provide interexchange facilities-based telecommunications services in Illinois, a Certificate of Service Authority to provide resold local and interexchange telecommunications services, and a Certificate of Exchange Service Authority to provide local facilities-based telecommunications services in Illinois (the "RCN CPCN").[202] Crown Castle Fiber LLC *is the same entity* granted the RCN CPCN as the result of several name changes. On November 18, 2010, RCN changed its name to Sidera Networks, LLC.[203] Sidera Networks, LLC changed its name to Lightower Fiber Networks II, LLC, on October 1, 2014.[204] Lightower Fiber Networks II, LLC changed its name to Crown Castle Fiber LLC on May 16, 2018.[205] Thus, Crown Castle Fiber LLC is the entity granted the RCN CPCN by the ICC.

[202] Complaint, Attachment A, Ex. 6, CCF102 – CCF107.

[203] Declaration of Neil Dickson ("Dickson Decl.") ¶ 4, Ex. 1 (attached hereto as Attachment G).

[204] Dickson Decl. ¶ 4, Ex. 2.

[205] Complaint, Attachment A, Ex. 5, CCF88 – CCF101.

2. NextG Networks of Illinois, Inc. Path To Crown Castle Fiber LLC

In 2003, the ICC granted NextG Networks of Illinois, Inc. a Certificate of Interexchange Service Authority to provide interexchange facilities-based telecommunications services, Certificate of Service Authority to provide resold local and interexchange telecommunications services in Illinois, and a Certificate of Exchange Service Authority to provide local facilities-based telecommunications services.[206] On May 3, 2012, NextG Networks of Illinois, Inc. changed its name to Crown Castle NG Central Inc.[207] Crown Castle NG Central Inc. then converted into to Crown Castle NG Central LLC on December 20, 2013.[208]

Crown Castle NG Central LLC was subsequently merged into Crown Castle Fiber LLC, which was an affiliate of Crown Castle NG Central LLC via common ownership, effective as of 11:59 pm on December 31, 2018.[209] Due to its merger into Crown Castle Fiber LLC, which already held Certificates of Authority from the ICC (as discussed above), Crown Castle NG Central LLC requested the ICC to cancel its Certificates of Service Authority to provide competitive facilities-based and resold local exchange and interexchange telecommunications service in Illinois.[210] On March 6, 2019, the ICC granted this request.[211]

3. Sunesys, LLC Path To Crown Castle Fiber LLC

In 2006, the ICC granted Sunesys, LLC a Certificate of Interexchange Service Authority to operate as a provider of facilities-based interexchange telecommunications services.[212]

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[206] Complaint, Attachment A, Ex. 7, CCF110.

[207] Dickson Decl. ¶ 5, Ex. 3.

[208] *Id.* ¶ 5, Ex. 4.

[209] *Id.* ¶ 6, Ex. 5.

[210] Complaint, Attachment A, Ex. 7, CCF109-111.

[211] *See id.*

[212] Complaint, Attachment A, Ex. 7, CCF113.

Sunesys, LLC was ultimately merged into Crown Castle Fiber LLC, which was an affiliate of Sunesys, LLC via common ownership.[213]

Due to its merger into Crown Castle Fiber LLC, Sunesys, LLC requested the ICC to cancel its Certificates of Service Authority to provide competitive facilities-based and resold local exchange and interexchange telecommunications service in Illinois.[214] On March 6, 2019, the ICC granted this request.[215]

D. Crown Castle Fiber LLC Is The Correct Party Under The Pole Attachment Agreements

ComEd seeks to take issue with Crown Castle as the party to this proceeding, misguidedly asserting that it "does not believe it has a written pole attachment agreement with Crown Castle because ComEd is unaware of any valid written notification of assignment of any of the pole attachment agreements with NextG, Sunesys, and Lightower, nor did ComEd provide any prior written consent to any such assignments."[216] As explained, below Crown Castle has never been required to provide notice to or obtain consent from ComEd under the assignment provisions in the pole attachment agreements that ComEd executed with NextG Networks of Illinois, Inc., Sunesys, Inc., and Sidera Networks, LLC d/b/a Lightower Fiber Networks.

1. Crown Castle Fiber LLC Has Attachment Rights Under the Pole Attachment Agreement Executed by Sidera Networks, LLC and ComEd

Crown Castle Fiber LLC is the proper entity to file a complaint under the pole attachment agreement executed by Sidera Networks, LLC d/b/a Lightower Fiber Networks and ComEd

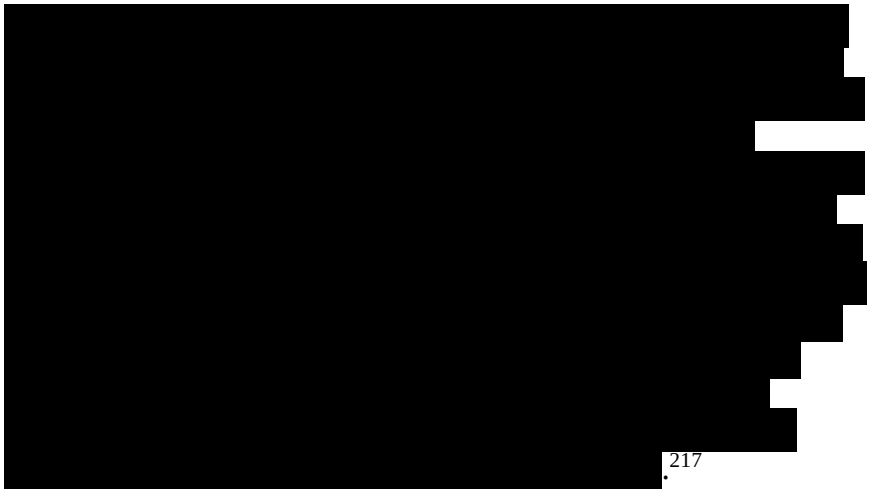
[213] Dickson Decl. ¶ 7, Ex. 7.

[214] Complaint, Attachment A, Ex. 7, CCF112-114.

[215] *See id.*

[216] Answer p. 11, ¶ 28.

("Lightower Pole Attachment Agreement") on July 26, 2013. Section 16.1 of the Lightower Pole Attachment Agreement provides:


[redacted].[217]

As discussed above, Sidera Networks, LLC changed its name to Lightower Fiber Networks II, LLC on October 1, 2014. Because Sidera Networks LLC merely changed its name and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Lightower Pole Attachment Agreement with ComEd, Lightower Fiber Networks II was not required to obtain ComEd's consent under Section 16.1 of the Lightower Pole Attachment Agreement.

Crown Castle International Corp., through several indirect subsidiaries, acquired Lightower Fiber Networks II, LLC on November 1, 2017.[218] Lightower Fiber Networks II's existence remained unchanged, however, other than a change of its ultimate parent entity. Because Lightower Fiber Networks II did not change, it did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Lightower Pole Attachment Agreement. Consequently, Lightower Fiber Networks II was not required to obtain ComEd's

[217] Complaint, Attachment A, Ex. 3 CCF66.

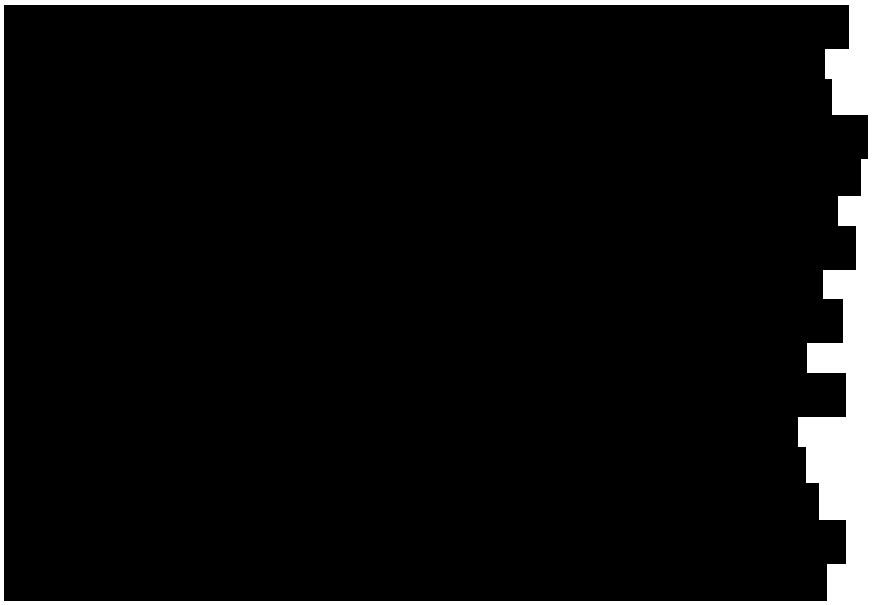
[218] Dickson Decl. ¶ 4, Ex. 2.

consent under Section 16.1 of the Lightower Pole Attachment Agreement of this transaction which involved only a change in the ultimate ownership of Lightower Fiber Networks II.

As discussed above, Lightower Fiber Networks II, LLC changed its name to Crown Castle Fiber LLC on May 16, 2018.[219] Because Lightower Fiber Networks II, LLC merely changed its name and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Lightower Pole Attachment Agreement, Crown Castle Fiber LLC was not required to obtain consent from ComEd under Section 16.1 of the Lightower Pole Attachment Agreement.

2. Crown Castle Fiber LLC Is the Successor-In-Interest to the Pole Attachment Agreement Executed by NextG Networks of Illinois, Inc. and ComEd

Crown Castle Fiber LLC is the proper entity to file a complaint under the pole attachment agreement executed by NextG Networks of Illinois, Inc. and ComEd ("Crown Castle Pole Attachment Agreement") on December 22, 2004. No notice to or approval by ComEd was required. Section 15.1 of the Crown Castle Agreement provides:



[219] Complaint, Attachment A, Ex. 5, CCF88-101.


[220]

In 2012, NextG Networks, Inc., which wholly-owned NextG Networks of Illinois, Inc., was acquired by Crown Castle International Corp., via a merger with an indirect subsidiary of Crown Castle International Corp.[221] NextG Networks of Illinois, Inc. continued unchanged, other than a change in its ultimate parent entity.[222] As a result, NextG Networks of Illinois, Inc. did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement with ComEd. Therefore, NextG Networks of Illinois, Inc. was not required to obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement.

NextG Networks of Illinois, Inc., changed its name to Crown Castle NG Central Inc. on May 3, 2012.[223] Because NextG Networks of Illinois, Inc. merely changed its name and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement, the company was not required obtain consent from or

[220] Complaint, Attachment A, Ex. 1 CCF24.

[221] Dickson Decl. ¶ 5.

[222] *Id*.

[223] *Id.* ¶ 5, Ex. 3.

provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement.

Subsequently, Crown Castle NG Central, Inc. converted into to Crown Castle NG Central LLC on December 20, 2013 via a merger.[224] Because Crown Castle NG Central, Inc. changed its corporate form from a corporation to a limited liability company and did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement, Crown Castle NG Central LLC was not required obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement.

Finally, Crown Castle NG Central LLC was merged into Crown Castle Fiber LLC, an affiliate of Crown Castle NG Central LLC, effective as of 11:59 pm on December 31, 2018.[225] First, by this merger, Crown Castle NG Central LLC did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Crown Castle Pole Attachment Agreement because it is well settled law that a merger is not an assignment or transfer.[226] Second, in

[224] *Id.* ¶ 5, Ex. 4.

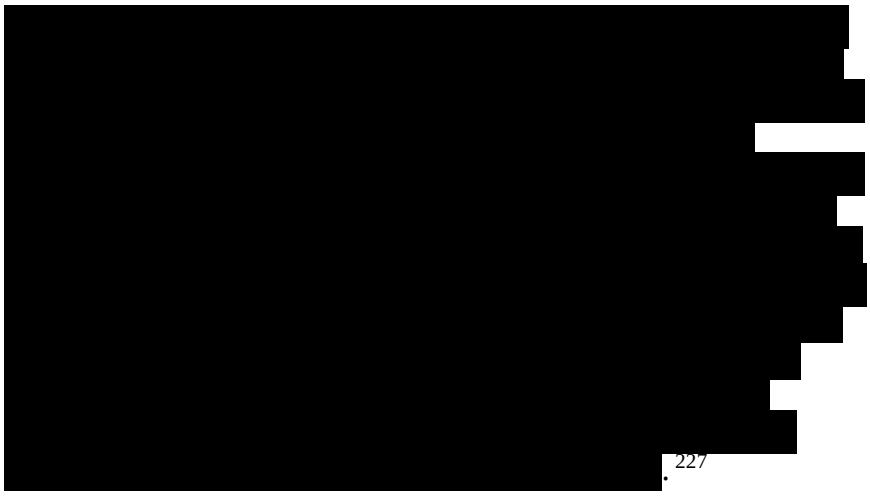
[225] *Id.* ¶ 6, Ex. 5.

[226] While Illinois courts have not directly addressed whether a merger like the one involving Crown Castle and NextG constitutes an assignment, other jurisdictions have, and it is well established law that there is no assignment or transfer. *See e.g.*, *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 83 (Del. Ch. 2013); *Disk Authoring Techs. LLC v. Corel Corp*., 122 F. Supp. 3d 98, 112 (S.D.N.Y. 2015). The Model Business Corporations Act further supports this point. Section 11.07(a)(3)-(4) states "all property owned by, and every contract right possessed by, each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are the property and contract right**s** of the survivor **without transfer**, reversion or impairment. All debts, obligations and other liabilities of each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are debts, obligations or liabilities of the survivor." Model Business Corporations Act § 11.07(a)(3)-(4) (emphasis added). Moreover, the official comment to this section states: "The survivor automatically becomes the owner of all real and personal property and becomes subject to all the

addition, even if an assignment or transfer were found to have occurred, Crown Castle Fiber LLC was not required obtain consent from or provide notice to ComEd pursuant to Section 15.1 of the Crown Castle Pole Attachment Agreement because Crown Castle NG Central LLC merged into an affiliate. Section 15.1 of the Crown Castle Pole Attachment Agreement exempts affiliate transactions from the notice and approval requirement, stating "that Licensee may assign or transfer its rights, privileges and obligations to a parent, affiliate or subsidiary company without prior written notice to ComEd."

3. Crown Castle Fiber LLC Is the Successor-In-Interest to the Pole Attachment Agreement Executed by Sunesys, Inc. and ComEd

Crown Castle Fiber LLC is the proper entity to file a complaint under the pole attachment agreement executed by Sunesys, Inc. and ComEd ("Sunesys Pole Attachment Agreement") on May 5, 2005. Section 16.1 of the Sunesys Agreement provides:



.[227]

liabilities, actual or contingent, of each other party to the merger. **A merger is not a conveyance, transfer, or assignment.**" *Id.* Official Comment (emphasis added).

[227] Complaint, Attachment A, Ex. 2, CCF44.

Sunesys, Inc. converted into Sunesys, LLC on December 28, 2006 via a merger, which had the effect of changing the corporate form of the entity.[228] No assignment or transfer occurred to trigger Section 16.1 of the Sunesys Agreement by the change of corporate form to an LLC. Moreover, as noted above, the fact the corporate form change occurred via a merger does not constitute a transfer or assignment.[229]

On August 4, 2015, through a merger at the ultimate parent level, Sunesys LLC became an indirect subsidiary of Crown Castle International Corp.[230] Sunesys LLC's existence remained unchanged, other than its ultimate parent. Because the transaction in 2015 involved only a change at the parent level, Sunesys LLC did not "assign or transfer all or any portion of its rights, privileges and obligations" under the Sunesys Pole Attachment Agreement. As a result, Sunesys LLC was not required to obtain ComEd's consent pursuant to Section 16.1 of the Sunesys Pole Attachment Agreement.

Sunesys, LLC was ultimately merged into Crown Castle Fiber LLC.[231] As stated above a merger is not considered an assignment or transfer; therefore, no consent or notice to ComEd was required.[232]

Ultimately, it is noteworthy that after the various name changes and mergers discussed above, the current Crown Castle Fiber LLC holds assets having a value well in excess of $11 billion based upon the acquisition of those entities and other affiliated entities which have also

[228] Dickson Decl. ¶ 7, Ex. 6.

[229] *See e.g.*, *Meso Scale Diagnostics*, 62 A.3d at 83; *Disk Authoring Techs.*, 122 F. Supp. 3d at 112; Model Business Corporations Act § 11.07(a)(3)-(4).

[230] Dickson Decl. ¶ 7.

[231] *Id.*

[232] *See e.g.*, *Meso Scale Diagnostics*, 62 A.3d at 83; *Disk Authoring Techs.*, 122 F. Supp. 3d at 112; Model Business Corporations Act § 11.07(a)(3)-(4).

been merged into Crown Castle Fiber LLC, and has no direct debt.[233] Therefore, the contracting party with ComEd is a substantially larger entity with a greater net worth than Sunesys LLC, Crown Castle NG Central LLC, or Lightower Fiber Networks II, LLC, formerly known as Sidera Networks, LLC. Thus, even if any of the notice provisions had been triggered, ComEd had no good-faith basis to deny consent.

ComEd has no legitimate claim that it did not know that Crown Castle is the current party to the pole attachment agreements. Indeed, it admits that it has permitted Crown Castle to install fiber and wireless attachments to ComEd poles.[234] Clearly, ComEd has understood that Crown Castle was party to the relevant pole attachment agreements. Otherwise, it would not have allowed Crown Castle to attach.

4. The Crown Castle – Nextel Deal Described in ComEd's Answer is Not Analogous to Any of the Transactions Described in this Section of Crown Castle's Reply

ComEd mistakenly analogizes the transactions described in this section of Crown Castle's Reply to a different transaction that involved transfer of assets. In 2016, Nextel West Corporation ("Nextel") transferred some of its attachments on ComEd-owned poles to Crown Castle.[235] Because this deal involved a transfer of those assets, Crown Castle notified ComEd of the transaction in accordance with Nextel's pole attachment agreement with ComEd, which provided that Nextel "[redacted]."[236]

[233] Dickson Decl. ¶ 8.

[234] Answer ¶ 27.

[235] Answer pp. 13-14, ¶¶ 31-32.

[236] Answer, Attachment D, CEC26 – CEC58.

The Nextel transaction is not analogous to transactions pertaining to the Crown Castle Pole Attachment Agreement, the Sunesys Pole Attachment Agreement, or the Lightower Pole Attachment Agreement. As discussed above, those transactions either involved (a) a merger, (b) a name change, or (c) a change in corporate form. None of the transactions involved an assignment or transfer of assets. Therefore, ComEd's analogy is misplaced.

E. Crown Castle Is Not Only Entitled To Prospective Relief

ComEd argues that because both ComEd and Crown Castle "proceeded for many years with the understanding that the pole attachments at issue" were subject to the ICC's jurisdiction, not the FCC's jurisdiction, the FCC cannot impose its rules "retroactively" under the statute, and it would nevertheless be inequitable and unjust to do so.[237] ComEd's contention is wrong for several reasons.

1. The ICC Lacks Jurisdiction To Hear This Complaint

Perversely, ComEd's argument simply emphasizes Crown Castle's point that the ICC does not have jurisdiction to hear this Complaint. As Crown Castle explained, the Commission has jurisdiction over rates, terms, and conditions of pole attachments except "where such matters are regulated by a State."[238] For its part, the ICC has confirmed to the Commission that its pole attachment regulations only apply to attachments by "cable television ('CATV') companies," without making reference to attachments by telecommunications companies.[239] As a result, the ICC does not have the authority to regulate attachments by telecommunications companies to electric utilities' poles, and jurisdiction over such attachments remains with the Commission.[240]

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[237] Answer pp. 15-23 (Aff. Def. ¶¶ 34-51).

[238] Complaint ¶ 13 (citing 47 U.S.C. § 224(c)(1)).

[239] Complaint ¶¶ 17-19.

[240] Complaint ¶ 19-20.

ComEd's theory is that either the ICC had regulatory control, or ComEd reasonably understood that the ICC had regulatory control. However, ComEd's argument that it did not know that it was forbidden from engaging in the egregious behavior described in Crown Castle's Complaint suggests that ComEd understood fully that ICC had no rules governing telecommunications attachments. Moreover, ComEd cites no basis for its belief that it was free to engage in this behavior. The seemingly only logical explanation for such conduct is that ComEd recognized the ICC had no rules regarding attachments by telecommunications providers, which only further underscores Crown Castle's reasoned explanation that the FCC has jurisdiction over this matter.

In any event, contrary to ComEd's contention, the relief Crown Castle seeks in its Complaint does not implicate "retroactivity" concerns. ComEd argues that the Commission may not impose "retroactive rates" and that the Pole Attachment Act does not allow for "retroactive application of rules."[241] Yet, the Commission has not promulgated new rules and attempted to apply them retroactively to a prior case. The reality is that because there were never ICC rules applicable to telecommunications attachments, the Commission's rules *have always applied* to ComEd's behavior and this case because the ICC never had authority to regulate telecommunications attachments.

Even assuming, *arguendo*, that ComEd's belief that ICC was the appropriate regulator in this instance is in fact reasonable, ComEd had notice that its practices (requiring new attachers to pay for access to red tag poles and unreasonable delay) were denials of access and unjust and unreasonable terms and conditions of attachment. If ComEd assumed the ICC had jurisdiction, as ComEd claims, then at a minimum the FCC's long-established precedent sets forth powerful,

[241] Answer pp. 18-19 (Aff. Def. ¶¶ 43-44).

persuasive authority regarding what constitutes unlawful denials of access and "just and reasonable" rates, terms, and conditions. The Commission's precedent was well-known and commonly followed even by "certified" states.[242]

Notably undermining ComEd's argument that it was not on notice of the Commission's rules, ComEd's parent company, Exelon, is a multi-state entity, and ComEd's affiliates operate in other states regulated by the FCC. Exelon filed a petition for reconsideration of the FCC's *One-Touch Make-Ready* ("*OTMR*") *Order*[243]—specifically addressing as objectionable the FCC's proposals on the red tag issue[244]—and in that petition, Exelon listed ComEd as an operating subsidiary.[245] ComEd cannot now claim that it was blindsided by the Commission's rules and precedent when it is actively seeking reconsideration of the red tag issue.

Moreover, the Crown Castle Pole Attachment Agreement incorporated the FCC pole rental rate formula.[246] This further evidence that the parties viewed the Commission's rules and decisions as informing Crown Castle's attachment to ComEd poles.

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[242] *See, e.g., Central Ill. Pub. Svc. Co. v. Illinois Commerce Comm'n*, 644 N.E.2d 817 (Ill. Ct. App. 1994) (affirming ICC's following of FCC precedent).

[243] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705 (rel. Aug. 3, 2018) ("*OTMR Order*").

[244] Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79, at 13-14 (filed Oct. 15, 2018) ("[A] rule requiring red-tagged poles to be replaced immediately is a rule requiring utilities to expand capacity . . . . [T]he *Coalition* respectfully requests the Commission to reconsider and reject this ruling requiring premature pole replacement."). A copy of the Petition for Reconsideration is attached hereto as Attachment H.

[245] Exelon Petition for Recon at 3 & n.6 ("Exelon's operating companies are Atlantic City Electric, Baltimore Gas and Electric, ***ComEd***, Delmarva Power and Light, PECO, and Pepco.") (emphasis added).

[246] Complaint Ex. A, Hussey Decl. Ex. 1, Crown Castle Pole Attachment Agreement § 11.1.1, CCF000018.

2. The Applicable Statute of Limitations For This Proceeding Is Ten Years

State statutes of limitations for actions on written contracts or written leases apply to pole attachment proceedings. Pursuant to 47 C.F.R. § 1.1407(a)(3), the Commission may order a refund "consistent with the applicable statute of limitations." Because the poles and attachments in question are located in the Chicago area, Illinois state law statutes of limitation apply to this proceeding.

The disputes in this proceeding stem from a contractual relationship between Crown Castle and ComEd. Therefore, the applicable statute of limitations is 735 ILCS 5/13-206, which provides that actions on written contracts and written leases must be brought within 10 years after the cause of action accrues.[247] Indeed, as ComEd notes in its Answer,[248] other parties to FCC pole attachment complaint proceedings have recognized that a state contract statutes of limitations are the "applicable statute of limitations."[249]

ComEd contends that Section 415(b) of the Communications Act, which sets a two-year limitations period, is "the most analogous provision because it governs private complaints against carriers."[250] ComEd also asserts that "[t]he most analogous provision of state law is a provision of the Illinois Public Utilities Act [220 ILCS 5/9-252], which provides for a two-year limitations period for cases in which a consumer alleges that any "public utility" has made an

[247] *See* 735 ILCS 5/13-206 ("**[A]ctions** on bonds, promissory notes, bills of exchange, written leases, written contracts . . . shall be commenced within 10 years next after the cause of action accrued.") (emphasis added).

[248] Answer p. 22 n.62.

[249] *See, e.g.*, *Verizon Virginia, LLC v. Virginia Elec. & Power Co.*, 32 FCC Rcd. 3750, 3764 (2017).

[250] Answer p. 22 (Aff. Def. ¶ 51).

'excessive charge.'"[251] It also contends that "this is not an action for breach of contract; it is an action contending that the rate is excessive or unjust and unreasonable."[252]

ComEd's argument is flawed for four reasons. First, as ComEd acknowledges, Section 415(b) of the Communications Act applies to complaints against "carriers." If the Commission intended to model 47 C.F.R. § 1.1407(b)(3) (former 47 C.F.R. § 1.14110) after Section 415(b) and limit refunds to two years, it would have expressly done so when it revised its refund rule in 2011.[253] When the Commission modified its refund rule, the Commission "reasoned that the current rule fails to make injured attachers whole, and is inconsistent with the *way that claims for monetary recovery are generally treated under the law*."[254] Monetary recoveries under contracts are generally governed by statute of limitations for actions on written contract.

Second, as ComEd acknowledges in its Answer, 220 ILCS 5/9-252 applies when a *consumer* alleges an excessive charge made by a public utility. Again, like with Section 415, the pole attachment agreement does not govern a relationship between a consumer and a seller; it governs the relationship between a lessor and a lessee. 220 ILCS 5/9-252 would apply to a claim by Crown Castle when it is a consumer of electric service—not when it leases space on ComEd poles.

[251] *Id.* p. 23 (Aff. Def. ¶ 51).

[252] *Id.* Interestingly, ComEd alleges this is a "rate" issue even in its Answer in this access complaint proceeding. *Id.*

[253] *2011 Order*, 26 FCC Rcd. at 5290, ¶¶ 110-12.

[254] *Id.* ¶ 110.

Third, 220 ILCS 5/9-252 applies to situations in which a public utility charges excessive amounts for "its product, commodity, or service."[255] Again, Crown Castle is not purchasing a "product, commodity, or service" from ComEd; it is leasing space on ComEd's poles.

Finally, 735 ILCS 5/13-206 applies to *any* "action" on written contracts or written leases.[256] ComEd cannot consistently assert both that (a) it matters whether Crown Castle is a party to one of the pole attachment agreements with ComEd (discussed *supra*) and that (b) the statute of limitations for contracts does not apply. Rather, ComEd's arguments make clear that this action is based in the pole attachment agreement relationship (and thus 735 ILCS 5/13-206 applies).

Because the 10-year statute of limitations for actions on written contracts and written leases apply to this proceeding, the refunds sought by Crown Castle are appropriate and fall within the applicable statute of limitations.

3. ComEd And Crown Castle's Prior Meetings With The Illinois Commerce Commission Are Irrelevant To This Proceeding

To support its purported belief that the ICC regulated all pole attachments in the State of Illinois and its belief that Crown Castle had that same understanding, ComEd argues that both ComEd and Crown Castle had meetings with the ICC to discuss pole attachment matters.[257] Whether ComEd or Crown Castle has previously met with the ICC to discuss pole attachment issues is not relevant to this proceeding. What is relevant to this proceeding are the facts that (a)

[255] 220 ILCS 5/9-25.

[256] *Cambridge Grp. Techs., Ltd. v. Motorola, Inc.*, 2018 IL App (1st) 170175-U, ¶ 57, *appeal denied*, 111 N.E.3d 971 (Ill. 2018) ("Section 13 206 of the Illinois Code of Civil Procedure provides that *any* action based on a written contract "shall be commenced within 10 years next after the cause of action accrued.") (emphasis added).

[257] Answer p. 17 (Aff. Def. ¶ 40).

the ICC has never adopted any rules or regulations that govern attachments made by telecommunications companies to electric utility poles and (b) the ICC confirmed in writing to the FCC that it does not have jurisdiction over such attachments.[258] By meeting with the ICC, Crown Castle did not concede that the ICC had jurisdiction. If anything, it confirmed the ICC does not have jurisdiction.

VI. INFORMATION DESIGNATION

The following individuals likely have information relevant to the proceeding:

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[258] Complaint ¶¶ 16-19 and Ex. B, Letter from ICC Chairman Brien J. Sheahan dated October 25, 2018.

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VII. CONCLUSION

ComEd's Answer fails to rebut Crown Castle's claims in its Complaint. For the reasons set forth in Crown Castle's Complaint and the foregoing, the Commission should grant Crown Castle the full relief requested in the Complaint, with refunds updated to reflect the most recent amounts unlawfully charged and paid as of the date of the Commission's final decision.

Respectfully submitted,

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August 5, 2019

RULE 1.721(m) CERTIFICATION

I, T. Scott Thompson, Complainant Crown Castle Fiber LLC verify that I have read this Reply and to the best of my knowledge, information, and belief formed after reasonable inquiry, the Reply is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The Reply is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

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Date submitted: August 5, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I caused a copy of the foregoing Reply to be served on the following (service method indicated):

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